The blacklisting of St. Vincent and the Grenadines by the FATF as a non-cooperative country in the fight against money laundering and the categorisation by the OECD as an uncooperative tax haven : justified or unjustified?

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Abstract

In June 2000 St. Vincent and the Grenadines (SVG) was blacklisted by the OECD and the FATF. Both organisations having assessed the supervisory and regulatory framework of SVG's financial system concluded that it was inadequate in the fight against money laundering and in so far as the OECD is concerned, maintained an uncooperative tax haven regime. This thesis challenges those conclusions and demonstrates that the assessments that were conducted by the OECD and FATF were inaccurate. Furthermore, this thesis also concludes that the conduct of the OECD/FATF was not in conformity with basic international legal principles relating to non-intervention and the doctrine of sovereign equality of States.

In arriving at its conclusions this thesis reviewed the historical imperatives of offshore financial centres (OFCs) and money laundering. It establishes that money laundering and the criminal activities that generate substantial proceeds of crime commence and end in the OECD/FATF member countries, yet none of them was blacklisted with SVG in 2000. Moreover, at the time when SVG was listed as an uncooperative tax haven certain OECD jurisdictions possessed harmful tax regimes yet none was listed as uncooperative.

The international condemnation of SVG by the OECD/FATF together with their threats of sanctions had an adverse effect on SVG's offshore financial services sector (OFSS) in particular and the economy as a whole. Accordingly, SVG was forced to amend is laws and make certain commitments to increase transparency of its offshore operations and provide for the effective exchange of information with other countries about their tax payers. The amendment to the laws of SVG did not substantially alter what was in existence prior to the blacklisting nonetheless, SVG was removed from the blacklists of the OECD in 2002 and the FATF in 2003.

THE BLACKLISTING OF ST. VINCENT AND THE GRENADINES BY THE FATF AS A NON-COOPERATIVE COUNTRY IN THE FIGHT AGAINST MONEY LAUNDERING AND THE CATEGORISATION BY THE OECD AS AN UNCOOPERATIVE TAX HAVEN- JUSTIFIED OR UNJUSTIFIED?

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Ibid.	same as above
AC	Appeal Cases
All ER	All England Reports
BCLC	Butterworths Company Law Cases
BSA	Banking Secrecy Act
CERDS	Charter of Economic Rights and Duties of State
CDB	Caribbean Development Bank
CFATF	Caribbean Financial Action Task Force
CIA	Central Intelligence Agency
CILR	Cayman Islands Law Reports
CLR	Commonwealth Law Reports
CRPA	Confidential Relationships Preservation Act
Ch.	Law Reports, Chancery
Crim. L. R.	Criminal Law Reports
CTR	Customer Transaction Reporting
DPMA	Drug (Prevention Misuse) Act
DTOA	Drug Trafficking Offences Act
ECCB	Eastern Caribbean Central Bank
EIA	Exchange of Information Act
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FINCEN	Financial Crimes Enforcement Network
FIU	Financial Intelligent Unit
FIUA	Financial Intelligent Unit Act
GATS	General Agreement in Trades and Services
GATT	General Agreement in Trade and Tariffs
GDP	Gross Domestic Product
IA	Insurance Act
IBA	International Banks Act
IBC	International Business Company
IBCR	International Business Company Regulations
IBR	International Banks Regulation
IC	International Company
ICA	International Companies Act
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICTA	Income Tax Act
IIA	International Insurance Act
IJIL	Indian Journal of International Law
IMF	International Monetary Fund
ITA	International Trust Act
ITR	International Trust Regulations
ITO	International Tax Organisation

Table of Abbreviations

JIBL	Journal of International Banking Law
J Int P	Journal of International Planning
JLR	Jersey Law Reports
JMLC	Journal of Money Laundering Control
JPM	Journal of Policy Modelling
LLCs	Limited Liability Corporations
MACM	Mutual Assistance in Criminal Matters
MAI	Multilateral Agreement on Investment
MFA	Mutual Funds Act
MFR	Mutual Funds Regulations
MLAT	Mutual Legal Assistance in Criminal Matters Treaty
NCCT	Non-cooperative Countries and Territories
NZLR	New Zealand Law Reports
OECD	Organisation for Economic Cooperation and Development
OECS	Organisation of Eastern Caribbean States
OFA	Offshore Finance Authority
OFC	Offshore Finance Centre
OFSS	Offshore Financial Services Sector
OPEC	Oil Petroleum Exporting Countries
PCA	Proceeds of Crime Act
PCB	Proceeds of Crime Bill
PCIJ	Permanent Court of International Justice
PCMLA	Proceeds of Crime (Money Laundering) Act
PCMLB	Proceeds of Crime and Money Laundering Bill
PCMLR	Proceeds of Crime (Money Laundering) Regulations
QB	Law Reports, Queen's Bench
RATL	Registered Agent and Trustee Licensing
RIAA	Reports of International Arbitral Awards
SIE	Small Island Economies
SVG	St. Vincent and the Grenadines
TC	Reports of Tax Cases
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNODCCP	United Nations Office for Drug Control and Crime Prevention
UNTS	United Nations Treaty Series
WLR	Weekly Law Reports
WTO	World Trade Organisation

DECLARATION

No part of this thesis has been previously submitted for the award of a degree in the University of Durham or any other University. This thesis is based solely upon the author's research.

STATEMENT OF COPYRIGHT

1. *Introduction*

> *"...a dwarf is as much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom."*[1]
>
> de Vattel 1758

This is a study about the application of basic principles of international law and the criminal law aspects of money laundering by looking at an important economic sector of St. Vincent and the Grenadines (SVG).[2] The study will show the impact of the Organisation for Economic Cooperation and Development's (OECD)[3] harmful tax initiative and the Financial Action Task Force's (FATF)[4] money laundering initiative on SVG's freedom to implement economic measures that sought to develop the offshore financial services sector (OFSS) and improve the livelihood of its people. More particularly, this study will demonstrate how the OECD and FATF's initiatives undermined SVG's freedom of choice as a sovereign State by violating the international legal principle of non-intervention and by their conduct, failing to acknowledge the existence of the doctrine of sovereign equality of States.[5] Furthermore, it will also demonstrate that the OECD/FATF did not have the legal authority to dictate the economic policies of SVG.

This study provides substantial details about the economy of SVG and the economic and legal implications of the OECD/FATF's initiatives. It is only by considering those

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[1] E. de Vattel, *Le droit des gens, ou principes de la loi naturelle* (Paris: J.-P. Aillaud, (1830), i, at 47 ('Preliminaires,' para. 18) repeated in Cassese A. "International Law," Oxford 2003 at p. 90

[2] St. Vincent and the Grenadines consists of a group of islands in the Eastern Caribbean.

[3] www.oecd.org :The OECD is a group of 30 countries which produce two thirds of the world's goods and services. It meets as a group to *"discuss, develop and refine economic and social policies. They compare experiences, seek answers to common problems and work to co-ordinate domestic and international policies to help members and non-members deal with an increasingly globalise world."* As at November 2003 the countries that represent the group are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the USA.

[4] http:/www1.oecd.org/fatf/AboutFATF_en.htm, *"The FATF is an intergovernmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. The Task Force is therefore a "policy making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas."* The FATF represents a group of 33 countries, territories and organisations with the most highly developed economies-their main task being to ensure good standards prevail in the global financial market place. These countries are Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, European Commission, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States of America. It is however important to note that in 2000 there were 26 FATF members.

[5] Buchanan A., "Justice, Legitimacy, and Self-Determination Moral Foundations for International Law" Oxford, 2004 at p. 312. *"By the formal equality of States here is meant the attribution to all States, large or small, weak or strong, of the same rights, immunities, liberties, and duties."*

details that the extent to which small developing States are affected by the decisions taken by big developed States can be greatly appreciated. The study concluded that the OECD/FATF's initiatives were not in conformity with international law and that those initiatives go to the root of the economy of SVG and the economic survival of its people. By undermining SVG's freedom to choose its economic policies the OECD/FATF significantly reduced SVG's power as a sovereign independent nation and effectively taken away its statehood. A further implication being that by significantly reducing SVG's ability to provide legitimate sources of income for its people, the condition was being created for illegitimate sources to take their places.

In June 2000 SVG was 'blacklisted' by the OECD as an uncooperative tax haven and by the FATF as non-cooperative in the fight against money laundering. The OECD concluded that the fiscal policy[6] of SVG was harmful to its member countries, in that it was not transparent and did not adequately provide for the disclosure of beneficial ownership of commercial entities and the effective exchange of information about tax payers.[7] Therefore, SVG's fiscal policy was viewed by the OECD as a conduit through which tax avoidance and tax evasion activities were facilitated for the benefit of the taxpayers of its member countries. Moreover, it also alleged that the fiscal policy of SVG encouraged capital flight from its member countries which effectively eroded their tax bases. It did not however adduce any evidence in support of those allegations.

The FATF on the other hand was highly critical of the regulatory and supervisory framework of the financial system in SVG and in particular the OFSS. It concluded that the said framework was inadequate, which therefore demonstrated that SVG was not co-operative in the fight against money laundering.[8] The OECD/FATF used the international media to condemn SVG as an uncooperative tax haven and a facilitator of money laundering and threatened countermeasures against SVG unless it amended its policies in a manner that the OECD/FATF considered to be desirable. This 'naming and shaming' campaign had an adverse effect on SVG's OFSS in particular and the economy as a whole.[9]

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[6] Parkin M., Powell M., and Matthews K., "Economics," Pearson Education Limited, 2003, at p. 735, *"Fiscal policy... is the use of the government budget to achieve macroeconomic objectives such as full employment, sustained long- term economic growth and price-level stability. The detailed fiscal policy tools are tax rates and the government purchases of goods and services."*
[7] See below at Chapter 1.4
[8] See Chapter 4
[9] See below at Chapter 1.1.1

Interestingly, however, at the time that the OECD 'blacklisted' SVG as an uncooperative tax haven, it was reported that some of its member countries were engaged in harmful tax practices (see below at para 1.5),[10] yet none of them was 'blacklisted' and condemned as being uncooperative. Additionally, countries such as Switzerland and Luxembourg[11] which were substantially engaged in the investment of private capital and were in effect competing with small island offshore jurisdictions such as SVG, did not support the harmful tax initiative but they were not 'blacklisted' as being uncooperative. Certain States in the USA, including Colorado and Montana, in order to attract investors, advertised that foreign judgments would not be recognised or enforceable against persons investing in those States.[12] The State of Delaware also provided anonymity to beneficial owners of limited liability corporations that were registered in that State.[13] Nevertheless, the OECD did not 'blacklist' the USA as being uncooperative.

Similarly, there were FATF member countries with regimes that facilitated money laundering but none of those countries was 'blacklisted' at the same time as SVG. For example, it has been reported that in the USA the revenues from illegal drugs alone were estimated to be in excess of $US120 billion annually.[14] In the United Kingdom and Canada over £2.4 billion and $15 billion were laundered every year.[15] What is however alarming is that research has shown that 90% of the bank notes in circulation in the USA were contaminated with illegal drugs and 99% of bank notes that were circulating in London were tainted with cocaine.[16] But the UK, Canada and the USA were not the only countries with serious money laundering problems. It was reported that the monies that were laundered annually in some other countries such as France, were in excess of 14 billion Francs, Russia, approximately $US15 billion,[17] Switzerland approximately $US500 billion and Italy, in excess of $US50 billion just to name a

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[10] Hay R, "OFCs: The Supranational Initiatives" –Private Client Business 2001,2, 75-91 at p. 84.
[11] See below at Chapter 1.5
[12] Ibid
[13] Ibid
[14] Howard C., "Butterworths Money Laundering Law," Butterworths, 2001 at p. 1/5
[15] Lilley P, "Dirty Dealing-The Untold Truth About Global Money Laundering," Kogan Page, 2000 at p. 27
[16] Ibid at p. 26

[17] Although Russia was blacklisted at the same time as St. Vincent and the Grenadines it was not at that time a member of the FATF.

few.[18] What is even more remarkable is that certain OECD/FATF member countries and their agencies had deliberately and as a matter of policy, condoned criminal activities[19] and facilitated the money laundering process.[20] Insofar as SVG was concerned, prior to it being 'blacklisted' it was ranked as a 'low priority'[21] country for money laundering purposes and no money laundering case had ever been brought before the court.[22]

It will also be established in chapter 2 that the criminal activities that generated the substantial proceeds that were laundered annually, actually occurred in the OECD/FATF member countries. Similarly, those countries were also major producers of the weapons that were used by criminals to carry out their crimes and to instil fear, serious injuries, murder and mayhem in societies the world over.[23] In the light of the foregoing and that which will be established elsewhere in this thesis, questions were being raised as to whether the OECD/FATF had been conspiring to introduce measures that ensured their continued pre-eminence in the provision of financial services or whether there were other insidious motives behind the harmful tax and money laundering initiatives.

For many years the Caribbean has been viewed as beautiful islands with pristine clear waters and white sand beaches, havens for those wishing to experience peace and tranquillity, joy and happiness. Within recent times however, the Caribbean region in addition to its tourist attractions has also been seen as a haven for money launderers and tax dodgers. That was the perception of the FATF and the OECD respectively. The FATF's money laundering initiative (see chapter 4) due to its significance to the stabilisation of the international financial system and its relevance to the peace and security of the world will be featured more prominently in this thesis. The harmful tax initiative[24] of the OECD runs counter to increased global competition, which is a universal policy pursued by the World Trade Organisation (WTO)[25] and accepted by the

[18] Lilley P, "Dirty Dealing-The Untold Truth About Global Money Laundering," 2000 at p. 27
[19] See below at Chapter 2.9
[20] See below at Chapter 2.8
[21] Griffith I., "Drugs and Security in the Caribbean, Sovereignty Under Seige," Pennsylvania State University Press, 1997 at p. 110
[22] St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997, at pp 54 – 55 per Campbell P., Attorney General
[23] See Chapter 2.4.1
[24] OECD Report, "Harmful Tax Competition – An Emerging Global Issue" 1998
[25] See chapter 6.9.1 for brief discussion on WTO.

international community of States[26] and therefore will in this thesis bear less significance than the FATF's money laundering initiative. However, to the extent that their countermeasures were detrimental to small island economies and bearing in mind that in substance the FATF and the OECD were one and the same (see chapter 6.2.4) organisation, both initiatives will be examined together where necessary. As Stessens has observed:

> *"Although the 'blacklisting' in theory only concerns the fight against money laundering, it is clear that, in view of both the factual connection between money laundering and tax dodging and the timing of the publication of the FATF review, that the 'black list' and the enforcement measures that go with it, are also relevant to the fight against 'unfair tax competition.'"*[27]

The FATF was established by the G7[28] countries in 1989 for the purpose of combating money-laundering activities worldwide, especially regarding the proceeds of the illegal drugs trade and fiscal crime.[29] That perception formed the basis of the FATF's first Report in 1990. In it the FATF stated that;

> *"These jurisdictions [meaning small island offshore financial centres] are part of the world payments system without any restriction. So long as this is the case, cash exports will tend to go to these countries for integration into the financial system there and return by means of wire transfers (my emphasis added)."*[30]

The FATF, it would appear, has concluded that fighting international crime is a task of very great difficulty. Therefore, rather than placing emphasis solely on the fight against international crime itself, efforts are being made globally to take the profits out of crime by criminalizing the proceeds of crime. In that regard McLean has stated that:

> *"From the point of view of the criminal, it is no use making a large profit out of criminal activity if that profit cannot be put to use...Putting the proceeds to use is not as simple as it may sound. Although a proportion of the proceeds of crime will be kept as capital for further criminal ventures, the sophisticated offender will wish to use the rest*

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[26] Greig D., "International Community Interdependence and All That Rhetorical Correctness," in Kreijen G., "State Sovereignty and International Governance," Oxford University Press, 2002 at p. 531 where the term "international community" was given four interpretations. The interpretation that is relevant refers to the international community, "*...normatively as representing the law-making authority of the substantial majority of States to establish rules of customary international law, or more particularly to bestow upon specific rules the status of peremptory norms.*"

[27] Stessens G., "The FATF 'Blacklist' of Non-Cooperative Countries or Territories," 14 Leiden Journal of International Law 199-208 (2001) at pp. 204-205

[28] The seven most advanced economic nations namely, USA, Germany, France, UK, Canada, Japan and Italy. These countries meet periodically to discuss world economic and financial affairs.

[29] Hampton M., & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and Re-configuration of Global Finance" World Development vol. 30., No. 9 (2002) pp. 1657-1673 at p. 1661: Note also that in the aftermath of September 11th, 2001[29] the FATF was given further responsibilities to combat money laundering of terrorist funds,[29] thus imposing additional pressure on Caribbean territories that provide offshore financial services.

[30] FATF, *Annual Report 1989-90, at p 9 (1990)*. See also European Commission, *Second Commission Report to the European Parliament and the Council on the Implementation of the Money Laundering Directive, COM (1998) 401, at p 4*

> *for other purposes...If this is to be done without running an unacceptable risk of detection, the money which represents the proceeds of the original crime must be "laundered"; put into a state in which it appears to have an entirely respectable provenance."*[31]

Accordingly, attempts to conceal, convert, transfer or in any other way deal with or dispose of the proceeds of crime have become criminal offences in many countries and those who commit those offences are likely to have their properties forfeited and or confiscated. When consideration is given to the suggestion that global money laundering totals between $US1.5[32] and $US2.85[33] trillion per year, the seriousness of the efforts to combat money laundering activities then becomes evident. Therefore, it appears that if the FATF's efforts to take the profits out of crime succeed, there will be no incentive for organised crime to flourish. But that success is only possible with the support of nations throughout the world. Accordingly, there is an argument for all jurisdictions to institute adequate measures that will ensure effective international cooperation in the fight against money laundering.

That argument is foundational of a policy framework which will be referred to in this thesis as *the theory of international cooperation*. In this regard the FATF in 1990 issued and adopted 40 Recommendations[34] for its member States which it considers to be effective countermeasures in the armoury of those countries that wish to join the fight against money laundering activities. Moreover, in April 2000 it published a Report on Non-Co-operative Countries and Territories (2000) which established 25 assessment criteria[35] to identify detrimental practices that restrict cooperative measures to combat money laundering. Those assessment criteria related to countries and territories that were not members of the FATF and were not restricted to offshore finance centres(OFCs). The contents of the Report also threatened that countermeasures (see chapter 6.7.1) would be taken against jurisdictions that the FATF considered to be non-co-operative.

The 25 criteria for assessing non-cooperative countries and territories represent standards within the overarching *theory of international cooperation* which was founded

[31] McLean, J., "International Judicial Assistance,", Oxford, 1992 at p. 184.
[32] Lilley P, "Dirty Dealing-The Untold Truth About Global Money Laundering," 2000 at p. 28: see also the United Nations Human Development Report 1999
[33] Ibid at pp 29-30
[34] See http://www.oecd.int/fatf/
[35] Ibid

on the premise that the fight against money laundering will gain greater efficacy if all countries and territories introduced anti-money laundering legislation which also provided for the effective sharing of information. For the purposes of this thesis those standards will be categorised under three principles, namely; ***(a)** the principle of disclosure* which is aimed at strengthening international co-operation in order to facilitate the exchange of information that may lead to the conviction of an offender and the freezing, seizure and confiscation of his proceeds of crime; ***(b)** the principle of regulation* which requires the introduction of laws that will criminalise dealing with the proceeds of all serious crimes or crimes that will generate large proceeds and permitting the freezing, seizure and confiscation of property that relates to the proceeds of crime and; ***(c)** the principle of transparency* which seeks to establish very clearly the role of financial institutions in identifying their customers, instituting effective audit trails so that a transaction can be traced from its origination to its completion and reporting on any transaction that is considered to arouse suspicion. These three principles will also be applied to the OECD' harmful tax initiative (see later in this chapter). The overlapping of these principles was highlighted in the 1998 OECD Report wherein it was stated that:

> *"Some jurisdictions have enacted laws (e.g., providing anonymous accounts) that prevent financial investigators from providing tax authorities with information about investors. Thus, tax administrators lack the power to compel such information from institutions, and they cannot exchange information under tax treaties or other types of mutual assistance channels. The most obvious consequence of the failure to provide information is that it facilitates tax evasion and money laundering. Thus, these factors are particularly harmful characteristics of a tax haven and ...of a harmful tax regime."*[36]

In June 2000 after having conducted the evaluation of 26 countries and territories the FATF published a Report in which St. Vincent and the Grenadines (SVG) along with 14 other jurisdictions[37] were blacklisted as being non-cooperative in the fight against money laundering. In response to the blacklisting, the Financial Crimes Enforcement Network (FINCEN)[38] issued a Financial Advisory (see chapter 6.7.1) in July 2000 against SVG.[39] The Advisory cautioned that all money wire transfers to and from SVG

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[36] OECD Report, "Harmful Tax Competition and Emerging Global Issue" 1998, at p. 24 para 53

[37] These 14 jurisdictions are the following: Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St. Kitts and Nevis.

[38] A department of the US Treasury

[39] The financial advisory was issued pursuant to the FATF's Recommendation 21 which provides that, "financial institutions should pay special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations." Recommendation 21 was invoked against all the countries that were blacklisted. The FATF has in the past issued official warnings to Turkey, the Seychelles and Austria and advised its members to apply Recommendation 21 against those two countries. Awarning was issued on 1st February, 1996, after the Seychelles had enacted the Economic Development Act 1985 which contained

would be diligently scrutinized but stopped just short of instructing investors not to do business in or with SVG. This had serious implications for other Caribbean offshore jurisdictions. Those that were not as yet evaluated moved with haste to revise their regulatory and supervisory framework to give effect to the requirements of the FATF.[40]

Over the past twenty five years or so, and as recently as the 1990's, most of the English speaking Caribbean territories[41] have been to a large extent encouraged[42] and even been forced into trading in a product that they considered to be competitive with other countries (especially developed countries). This product was offshore financial services. As a result, some of those Offshore Financial Centres (OFCs) have achieved a remarkable level of success[43] which is currently reflected in the increased quality and standard of life of their residents. There are those jurisdictions[44] whose economies depended solely on the revenues earned from the provision of offshore finance services. In carrying out its evaluation, the FATF apparently paid very little attention to the vulnerable state of the economies of those OFCs and the likely economic impact of an international "name and shame campaign." Insofar as SVG was concerned, it will be established in Chapter 4 that the FATF's assessment of SVG's regulatory and supervisory framework was for the most part fraught with inaccurate conclusions and dubious to say the least.

Whereas, it is generally accepted that there needs to be a global effort in the fight against international crime, such an effort must also include the views of all the States being assessed and be reflective of the prevailing socio-economic, cultural and political environments of all of them. The FATF however, appeared not to have considered those factors when it evaluated SVG and even if they were considered, no effort was made by

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immunity provisions that would have made lawful the laundering of proceeds of all crimes, except those that are serious. The warning was lifted on 11th October 2000 after Seychelles repealed the Economic Development Act 1985, which had however, never entered into force. The warning against Austria was issued on 11th February, 1999 in respect of anonymous savings passbooks and was lifted on 7th November, 2000 after new legislation came into force on 1st November, 2000, which required all holders of new savings passbooks to be identified. : See also Stessens G., "The FATF 'Blacklist' of Non-Co-operative Countries or Territories"- 14 Leiden Journal of International Law (2001), 199-208 at p 205

[40] Hinterseer K., 'Criminal Finance-The Political Economy of Money Laundering in a Comparative Legal Context,' Kluwer Law International ,2002 at p 244

[41] Anguilla, Antigua and Barbuda, Barbados, British Virgin Islands, Dominica, Grenada, St. Kitts and Nevis, St. Lucia.

[42] Hampton M., & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and Re-configuration of Global Finance" World Development vol. 30, No. 9, pp. 1657-1673, 2002 at p. 1659. where it was suggested that Britain encouraged its dependent territories to engage in the provision of offshore financial services as a means of reducing aid to those countries.

[43] Bahamas, Bermuda, Cayman Islands, British Virgin Islands

[44] Anguilla, Bahamas, British Virgin Islands, Cayman Islands, Turks and Caicos Islands, Bermuda

the FATF to modify its initiative in the light of those circumstances. Moreover, the manner in which the evaluation of SVG was conducted and countermeasures were imposed did not accurately reflect the adequacy of the regulatory and supervisory framework in the fight against money laundering and neither was any consideration given to the country's record of international cooperation.[45] Likewise, the OECD which also placed SVG on the list of uncooperative tax havens[46] in June 2000 appeared not to have given much thought to the legality of its actions and the detrimental effect that those actions were likely to have on the economy of SVG. Accordingly, it is herein contended that the categorisation of SVG by the OECD as an 'uncooperative tax haven' and the blacklisting by the FATF as uncooperative in the fight against money laundering, were unjustified.

The principle of justice requires that there should be equal rights for all.[47] However, it will be established that the manner in which the OECD and the FATF implemented their harmful tax and money laundering initiatives was devoid of justice. It represented an unprecedented attack on small island OFCs and was discriminatory in its condemnation of so-called uncooperative countries. Within the context of this thesis the initiatives of the OECD and FATF could only be justified if they were in conformity with international law and were in response to SVG's breach of its international obligations. It is however contended that SVG by engaging in the provision of offshore financial services in the manner that it did was not in breach of its international obligations.[48] Buchanan is however of the view that an illegal act which results in favourable legal reform is justified in the circumstances.[49] He argued that it is acceptable to reform legal rules which encourage human rights violations by engaging in illegal conduct to bring about legal reform.[50]

Whereas money laundering may have the effect of destabilising the peace and security in the world,[51] this by itself may not provide sufficient justification for the manner in

[45] See Chapter 3
[46] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 17
[47] MacCormick D., "Formal Justice and the Form of Legal Arguments", in Freeman M., *"Lloyd's Introduction to Jurisprudence,"* Sweet and Maxwell, 2001 at p. 1475 *"Justice requires that essentially similar case be treated in the same way, and that essentially different cases be treated differently."*
[48] See Chapter 6.7
[49] Buchanan A., "Justice, Legitimacy, and Self-Determination Moral Foundations for International Law" 2004 at p. 462.
[50] Ibid at pp. 464-466
[51] United States Department of the Treasury and the United States Department of Justice, The National Money Laundering Strategy for 1999 @www.treas.gov. "*...money laundering is important in its own*

which the OECD/FATF implemented their respective initiatives. Although Buchanan's argument may have a strong moral justification when the illegal conduct is required in circumstances of human rights atrocities and violations, it nonetheless could not be justifiably extended to situations in which the human rights atrocities were the derivatives of the illegal act. Even if there were valid arguments for the improvement of the regulatory and supervisory framework of the financial sectors of several countries, especially in the face of rising international crime, the merits of those arguments pale into significance when consideration is given to the discriminatory and non-transparent manner in which the OECD/FATF's initiatives were implemented and the adverse economic consequences which ensued. Therefore, it is contended that Buchanan's perspective of achieving a favoured position through illegal means may not be applicable to the OECD/FATF's initiatives and their relevance to SVG. Instead, Bridget Stern's argument that reform of the international legal order should be effected through legal means and processes[52] is relevant to determining whether the OECD/FATF's initiatives as they related to SVG, were in fact justified and it is herein contended that they were not justified. As Stern has observed;

> *"...the globalisation of the economy highlights the fact that States are not always well equipped with the legal means to deal with actions...However, this is not a reason for one State to proclaim itself the ruler of the world. On the contrary, collective ways and means must be sought to improve the legal approach to economic globalisation. The solution has to be found in improving the effectiveness of international law. Some, however, are not prepared to wait for such evolution and have started to create their own systems of regulation, one which is totally disconnected with States and thus disconnected from both national and international law."*[53]

Essentially, the FATF had no legal authority in international law to impose its money laundering initiative on small States such as SVG and neither was the economic pressure from OECD member States in conformity with international law. This thesis will demonstrate the extent to which the initiatives of the OECD and FATF were inconsistent with established international legal rules and cannot be coherently sustained in conjunction with other rules in the system[54] of international law. Such a demonstration will be emphasised and sustained by arguing:

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right. It taints our financial institutions, and, where allowed to thrive, it erodes public trust in their integrity. Further in an age of rapidly advancing technology and globalisation, it can affect trade flows and ultimately disturb financial stability. In the end, like the crime and corruption of which it is a necessary part, money laundering is an issue of national security." See also Hinterseer K., "The Political Economy of Money Laundering in a Comparative Legal Context," Kluwer Law International, 2002 at p. 1

[52] Stern B., "How to Regulate Globalisation?," in Byers M., "The Role of Law in International Politics, Essays in International Relations and International Law" Oxford University Press, 2001 at p. 261.

[53] Ibid

[54] See Chapter 6.7

1. That offshore financial services is a legitimate commercial activity that should be maintained and encouraged and that the OECD's "harmful tax initiative" was unjustified. This argument will be robustly proffered in this chapter which also provides an overview of the economy of SVG and the historical imperatives of the OFSS. Similar arguments will also be made in chapter 6 which deals specifically with issues relating to sovereignty and the legality of the countermeasures of the FATF and OECD.
2. That OFCs are not solely responsible for the endemic global money laundering problem and the underlying crimes which give rise to the said problem. This argument will be made in Chapter 2 which deals specifically with money laundering and the extent to which OECD/FATF member countries have contributed to money laundering and the criminal activities that generate the proceeds which are eventually laundered.
3. That SVG had demonstrated legislatively and by its conduct ordinarily that it was prepared to and was in fact cooperating internationally in the fight against international crime (chapter 3).
4. That the FATF had not conducted a proper and accurate evaluation of the supervisory and regulatory framework of the financial system in SVG (chapter 4). Furthermore, the modifications that were made by SVG to the legislation after the blacklisting did not change substantially what had existed previously, yet as a result of those changes, SVG was removed from the OECD and FATF's blacklists (chapter5).
5. That the harmful tax and money laundering initiatives were not in conformity with international law (chapter 6).
6. That the loss of opportunity for economic improvement in the OFSS occasioned by the FATF/OECD initiatives may result in increased criminal activities in SVG, including money laundering (chapter 7).

In this chapter a brief overview will be given of the economy of SVG and the significance that was attached to the efforts to develop the OFSS. Mention will also be made of the impact on the OFSS as a result of the OECD and FATF's initiatives. Thereafter, a historical perspective of offshore financial services will seek to show the emergence of such services and the role that some of the OECD/FATF countries actually played in its development. Finally, an assessment will be conducted of the

OECD's initiative, wherein it will be argued that the tax regime of SVG when viewed within the framework of that initiative should not have been considered as an uncooperative regime.

1.1 *St. Vincent and the Grenadines*

St. Vincent and the Grenadines is a chain of small islands 150 square miles (or 388 square kilometres) in size and located in the Eastern Caribbean. For many years it was colonised by Britain but gained its independence from Britain on 27th October, 1979. Having been a British colony, its laws are based on the common law[55] of Britain and in most respects its statute laws are *pari materia* with those of Britain. Under the Application of English Law Act 1989 as amended in 1991 it is provided that:

> *"Subject to the provisions of subsection (2), without prejudice to the provisions of any Act of the Parliament of St. Vincent and the Grenadines and in particular the provisions of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, the common law and the rules of equity from time to time in force in England shall be in force in Saint Vincent and the Grenadines in so far as they may be applicable to the circumstances thereof and subject to such modifications thereto as the circumstances may require, save to the extent to which such common law or any such rule of equity may be excluded by any Act of the Parliament of Saint Vincent and the Grenadines."*[56]

Subsection (2) provides as follows;

> *"Where on or after the 27th October, 1969, any provision of the common law or any rule of equity has been, or is, abrogated or superseded by an Act of Parliament of the United Kingdom such provision or rule, as the case may be, shall continue to apply in Saint Vincent and the Grenadines as it applied before such abrogation or supersession unless and until an Act of the Parliament of Saint Vincent and the Grenadines provides otherwise."*[57]

The Application of English Law Act 1989 (as amended) has essentially extended the doctrine of precedent (*stare decisis*)[58] in English common law to SVG such that the decisions of the courts in England can be applied in the courts in SVG save and except where there is a statute in SVG to the contrary or the common law in England was altered by statute after 1969. SVG shares the same High Court and Court of Appeal as the other territories[59] in the English speaking Eastern Caribbean region but its final

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[55] Garner B., "Black's Law Dictionary," West Group, 2000, at p. 221 defines common law as; *"The body of law derived from judicial decisions, rather than from statutes or constitutions."*

[56] Section 4(1)

[57] Section 4(2)

[58] Garner B., "Black's Law Dictionary," West Group, 2000, at p. 1137 defines *stare decisis* as; *"The doctrine of precedent under which, it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.."*

[59] These territories are also referred to as the Organisation of Eastern Caribbean States (OECS) and include, Antigua and Barbuda, Anguilla, British Virgin Islands (BVI), Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent an the Grenadines.

Court of Appeal is the Privy Council[60] in the United Kingdom. In the light of Section 4 of the Application of English Law Act 1989 (as amended) and the fact that the Privy Council is the final Court of Appeal, the decisions of cases that have been decided in the courts of England and other Commonwealth countries will be used to support the arguments that are made in this thesis unless there is any other ruling to the contrary in SVG.

Moreover, due to the fact that no money laundering prosecution was brought before the court in SVG prior to the blacklisting by the OECD/FATF's and up to the removal of SVG from the OECD/FATF's list of uncooperative countries, the decisions of the courts in England and other Commonwealth countries where relevant, will be used to support the arguments that are made in this thesis. It is also noteworthy that because this thesis relates primarily to the supervisory and regulatory regime of the financial services sector in SVG prior to the blacklisting and up to the removal of SVG from the OECD/FATF's blacklists, amendments that were made to the said regime after SVG was taken off the OECD/FATF blacklists will not be considered, to the extent that those amendments may not have had any impact on SVG's removal from the OECD/FATF's blacklists.

1.1.1 The Economy

SVG has a population of approximately 116,812[61] people of which about 33%[62] falls within the age group of 15 to 30 years of age. Unemployment is very high, especially among the young and has been estimated at 22%.[63] However, that estimate was for the year 1997. When it is placed within the context of the large number of persons leaving school each year in search of jobs,[64] the true employment figure could range between 22% and 40%. Another hurdle that faces the policy makers is the level of poverty in the country. In 1996 the Caribbean Development Bank (CDB) conducted a poverty assessment survey of SVG and thereafter presented a report which showed that the level

[60] There are plans afoot to remove the Privy Council as the final Court of Appeal in most of the English speaking Caribbean territories (including St. Vincent and the Grenadines). A Caribbean Court of Justice is proposed and may well be established after 31st December, 2005.
[61] www.cia.gov/cia/publications/factbook/geos/vc.html
[62] St. Vincent and the Grenadines Budget Address 2003, at p. 35
[63] www.cia.gov/cia/publications/factbook/geos/vc.html
[64] Ministry of Education – 891 males and 475 females in secondary school of which approximately 300 enter A Level College-On average approximately 300 will leave the A' level college annually. Of that amount only 10% may be able to afford tertiary education

of poverty was 37.5%.[65] When compared with the poverty levels in the developing countries which were on average 29% in 1990 and 23% in 2002,[66] the level of poverty in SVG was very high indeed.

Between 1997 and 1999 SVG experienced an averaged growth rate[67] of 4% each year.[68] During that period the offshore sector as will be demonstrated below was showing great signs of success. Interestingly, there was a sharp decline in the rate of growth to 2% in 2000[69] when SVG was listed as uncooperative by the OECD and FATF. Since then, it further declined to 0.25% in 2001[70] and -0.5% in 2002.[71] SVG's economy is based on three main economic sectors, namely, agriculture, services (including tourism) and light manufacturing. For years the agricultural sector[72] contributed significantly to the gross domestic product (GDP).[73] The Banana Industry was the main contributor but due to the advent of the European Single Market Economy[74] and the liberalisation of trade,[75] the banana industry has been experiencing significant declines as well. In 1990 the revenues earned from bananas exceeded $110.52[76] million Eastern Caribbean Dollars. This represented 20.7% of the country's GDP which stood at $EC535.16 million.[77] By 1998 this had fallen to $EC55.5 million or 6.5% of the GDP which stood at $EC856.63

[65] St. Vincent and the Grenadines Budget Address 2003, at p. 10

[66] www.worldbank.org/data/wdi2002 "The Economy," at p. 193

[67] The rate of growth is the amount by which the value of aggregate production of goods and services in a country is either increased or decreased from one year to the next. See Parkin M., Powell M., and Matthews K., "Economics" Adderson Wesley, 5[th] edn. 2003, at pp. 424-440.

[68] www.imf.org/external/np/sec/pn/2002/pno211.htm - IMF Report on St. Vincent and the Grenadines 19[th] February, 2002

[69] Ibid

[70] Ibid 14[th] February, 2003

[71] www.cia.gov/cia/publications/factbook/geos/vc.html

[72] St. Vincent and the Grenadines Budget Address, 2003 at p. 6. *"The Agricultural sector, which traditionally has significantly impacted economic growth and development, declined by 7.1% in 2001 compared with a growth of 6.6% in 2000, and its contribution to GDP declined to 11.2% from 12.5% in 2000."*

[73] Parkin M., Powell M., and Matthews K., "Economics" 2003, at pp. 425 where Gross Domestic Product was defined as; *"...the value of aggregate production of goods and services in a country during a given period- usually a year."*

[74] McQueen M, Phillips C, Hallam D and Swinbank A, "ACP-EU Trade and Aid Cooperation-Post Lome IV" Commonwealth Secretariat, June 1998 at p. 160- The European Single Market was established on 1[st] July, 1993 to harmonise its trading policies by removing all obstacles to trade among EU member countries by 31[st] December, 2002. The effect of the European Single Market meant that the protection that SVG received for its bananas under Lome IV was remove and it was then open to competition from cheaper bananas from the Latin American countries.

[75] Werner Hans-Peter – "Lome, the WTO, and Bananas" – www.euforic.org/courier/1662_wer.htm where there was a discussion about the effect of the removal of the protection under the Lome Convention that was given to ACP countries by WTO members in October 1996.

[76] Audited Financial Statements of the St. Vincent and the Grenadines Banana Association. See also www.eccb-centralbank.org Statistical Information on the Eastern Caribbean Currency Union area.

[77] www.eccb-centralbank.org Statistical Information on the Eastern Caribbean Currency Union area.-St. Vincent and the Grenadines Selected Economic Indicators

million.[78] Banana revenues continued to experience further decline up to 2002 when it returned $EC35 million in revenues.[79] This decline was also reflected in its contribution to the GDP for 2002 where the proportion of banana revenues fell to 3.6% of the GDP which was estimated at $EC973.5 million.[80] What was remarkable is that between 1990 and 2000, banana revenues fell by 55.6%[81] and since the year 2000 up to 2002 there has been a further decline of 28.6%.[82] Accordingly, its contribution to GDP has been constantly eroded. Between 1990 and 2000 that contribution declined by 73.9%[83] and by 33.3% between 2000 and 2002.[84]

The constant erosion of what was once the bulwark of the economy has hampered SVG from reducing its high unemployment and poverty levels and although tourism has taken the lead as the main contributor[85] to the GDP, it has not been able to recoup the loss that was being suffered as a result of the rapidly declining banana industry.[86] Most importantly, the returns from the tourism sector had not been sufficient for a favourable impact on the high unemployment and poverty levels. SVG does not have any natural resources apart from its pristine clear waters and beautiful white sand beaches. Therefore, it had to diversify into an economic sector that enabled it to compete effectively on the international market.[87] Understandably, it turned to offshore financial services. SVG saw how well other Caribbean jurisdictions[88] were doing and decided to place emphasis on its own OFSS which was established since 1976 but which was neglected due to the heavy reliance on the banana industry for its sustenance. Accordingly, in 1996 SVG embarked on a mammoth legislative task to reform the

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[78] Ibid
[79] IMF Country Report No. 03/29- February, 2003, at p. 19
[80] Ibid at p. 18
[81] www.eccb-centralbank.org Statistical Information on the Eastern Caribbean Currency Union area.-St. Vincent and the Grenadines Selected Economic Indicators.
[82] Ibid
[83] Ibid
[84] IMF Country Report No. 03/29- February, 2003, at p. 18
[85] www.eccb-centralbank.org Statistical Information on the Eastern Caribbean Currency Union area.-St. Vincent and the Grenadines Selected Economic Indicators. -where it is shown that the Tourism sector has since 1993 surpassed the banana industry as the largest contributor to the GDP of St. Vincent and the Grenadines.
[86] IMF Country Report No. 03/29- February, 2003, at p. 3 – where it mentioned that the contribution of tourism to the GDP for 2002 is 21.7%.
[87] Stern B., "How to Regulate Globalisation?," in Byers M., "The Role of Law in International Politics" 2001 at p. 250. *"According to the principle of comparative advantage, it is recognised that nation-States, considering their endowments in factors of production-natural resources, labour, and capital. Economic growth will be higher, on the national as well as international levels, if the international division of labour is based on the theory of comparative advantage rather than on autarkic theories."*
[88] Bahamas, Cayman Islands, British Virgin Islands, Bermuda and Barbados.

OFSS which resulted in six new pieces of legislation[89] (see chapter 3) being passed in the House of Parliament.

1.1.1.1 Offshore Financial Services

In an address delivered by the then Prime Minister Sir James Mitchell on 18th December, 1996 to launch SVG's new legislative package, he outlined the anticipated benefits to the economy and the people of the country. Firstly, he stated they obviate the need to impose further taxes on the citizens of the country in order to improve the economic infrastructure, education and health and that the millions of dollars that the country will earn in fees will go towards financing those projects and a small enterprise development fund to help small businesses.[90] Secondly, the livelihood of the people will be improved since young professionals working in the OFSS will earn more. The business community will also grow and create further employment and other opportunities for the young people who are unemployed, thus preventing the country's best and brightest from leaving the country to seek further advancement in foreign climes.[91] Thirdly, he envisaged growth in the tourism industry which would create further employment.[92] The anticipated growth in the tourism industry as a result of growth in the OFSS had been seen by others as inevitable. Hampton and Christensen have observed that:

> *"Government advisers to many SIEs [meaning small island economies] – both those of local origin, and those from external institutions including the IMF have continued to take the view that a symbiotic relationship exists between the financial services sector and pre-existing sectors, particularly tourism. Tourism and offshore finance both required rapid air transport links. Both also needed hotels, restaurants, shops and attractive climates. The links appeared straight forward and self-evident. Likewise the benefits. The assertion ran that wealthy tourists would visit the islands, enjoy the lifestyle and subsequently establish residence and invest. At the same time bankers and tax accountants would be attracted by the climate and lifestyle and would bring with them knowledge and experience, adding to the virtuous circle. How could such a favourable situation go wrong ?"*[93]

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[89] The 1996 legislative package included, The St. Vincent and the Grenadines Offshore Finance Authority Act 1996, The Registered Agents Trustee Licensing Act 1996, The International Business Companies Act 1996, The Internationals Banks Act 1996, The International Trust Act 1996 and the Confidential Relationships (International Finance) Act 1996

[90] Mitchell J., "The Rebirth of an Offshore Jurisdiction," Offshore Investment Journal, February, 1997 Issue 73 at p. 31

[91] Ibid pp. 31 and 34

[92] Ibid p. 34

[93] Hampton M., and Christensen J.,"Offshore Pariahs? Small Island Economies, Tax Havens and Re-configuration of Global Finance" World Development, vol. 30. No. 9, pp 1677-1673 at p. 1664

The new legislation became effective from 1st January, 1997 and immediately the benefits from the reform of the OFSS became evident. At the beginning of 1997 and after 20 years of involvement in the provision of offshore financial services, there were only 3,471 offshore entities[94] on the registers. By 2000, the year in which SVG was listed as uncooperative by the OECD and FATF, SVG had increased its registrations of offshore entities[95] by 8,383 to 11,854 entities.[96] Thereafter, the reduction in the number of offshore entities has been constant. Interestingly, there were steady increases in annual offshore registrations from the reform of the OFSS in 1997 up to 1999. The decline actually commenced from 2000, the year in which SVG was blacklisted by the OECD and FATF.[97] At the end of the first year of operations after the reform, annual offshore registrations increased by 168% to 1,188.[98] There were further increases in 1998 and 1999. In 1998 annual registrations totalled 1,750, which represented a 45% increase over 1997 registrations.[99] In 1999 the annual number of entities that were registered amounted to 2,942 - an increase of 68% of the annual registrations in 1998.[100] There was however a 15% reduction in registrations during the year 2000 in which 2,503 entities were registered.[101] Since then, annual registrations of offshore entities have never reached 1,000 entities[102] and a number of offshore entities closed down their operations,[103] thus causing the OFSS to contract significantly. SVG therefore lost well over 4,400[104] offshore entities and the businesses that resulted from those registrations, thus leaving a grand total of 6,756 offshore entities on the Offshore Finance Authority's (OFA) registers by October, 2003.[105]

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94 International Companies, International Banking Companies and International Trusts.

95 International Business Companies, International Banks, International Trusts, International Insurances and Mutual Funds.

96 Records at the Registry of the Offshore Finance Authority in St. Vincent and the Grenadines

97 Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens and the Re-configuration of Global Finance" - World Development Vol. 30, No.9 pp. 1657-1673, 2002 at p 1668; *"The likely outcome of the current re-configuration of the global financial structure will be an erosion of the distinction between offshore and onshore finance, with the former losing many advantages that originally attracted finance capital to the 'islands in the sun.' Some OFCs will experience large-scale reductions of their principal economic activity, with direct losses, falling government revenues, and lower spending effects from the once-booming OFC sector, It is unlikely that the effects will be uniformed across all OFCs, and it is useful to speculate about what might happen to different types of OFCs."*

98 Records at the Registry of the Offshore Finance Authority in St. Vincent and the Grenadines.

99 Ibid

100 Ibid

101 Ibid

102 Ibid

103 Mitchell L., "A World of Opportunities" Searchlight Newspaper vol. 9, No. 40, Friday 3rd October, 2003. The author acknowledged that there was a reduction in registrations by over 4,000 offshore entities and that the National Commercial Bank encountered difficulties maintaining and obtaining correspondent banking relationships. No mention has however been made of annual registrations between 2001 and October, 2003.

104 Ibid

105 Ibid

The OFSS within a relatively short period of time had shown tremendous progress and great promise. Essentially, the fall in offshore registrations and the loss of opportunities that were available can be attributed to the initiatives of the OECD and FATF's. The international condemnation and vilification of SVG by the OECD and FATF, as an undesirable financial services jurisdiction, together with the aforementioned Financial Advisory, severely restricted the amount of offshore business that would otherwise have been established in SVG.[106] When such a negative publication has been reinforced by serious demands by the OECD/FATF for disclosure of information about investors and threats of economic reprisals, investors and prospective investors no longer considered the OFSS in SVG to be a desirable investment proposition. But offshore financial services had either directly or indirectly created quite a number of jobs for the young people and professionals in SVG, so much so that it has been reported that the OFSS generated a minimum of over $EC25 million per year between 1997 and 2000.[107] The loss of opportunity, the lost of jobs and by extension the lost of revenues all militate against the justification for the blanket application of the OECD and FATF's initiatives.

1.2 *The Emergence of the Offshore Financial Services Industry*

1.2.1 Terminologies, Definitions and Descriptions of offshore finance

Within the past 15 years different persons have used different terms in reference to the offshore financial services industry. The original term 'Tax Haven' has since given way to 'Offshore Finance Centres' (OFCs). The term OFC was seen as the preferred reference. Tax Haven it is believed significantly detracted from the range of financial services that were offered by these offshore jurisdictions and conjured up in the minds

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[106] Hay R., "Information Exchange and The Offshore Financial Services Centres: Part 1," Private Client Business, 2002,2, 88-97 at p. 94 *"Offshore centres rely on...foreign markets to conduct a financial services industry much larger than that which could be supported by domestic demand. Accordingly, it is not practical for an OFC to isolate itself from outside pressure by unplugging from the international grid unless the centre is prepared to restrict the local financial sector to the purely domestic environment, typically tiny markets in most OFCs."*

[107] Lewis L., "Whither the Offshore Finance Sector," The News Newspaper, Friday 17th August, 2001 at p. 9 where in enquiring as to whether the Confidentiality Laws or the much stricter regulatory and supervisory framework were the reasons for the brief success of the OFSS he stated; *"The Offshore Finance Sector is vital to the economy of this country [meaning St. Vincent and the Grenadines]... What was the reason for the marked increase between 1997 and 2000? Was it as a result of the Confidentiality laws or was it as a result of a much stricter regulatory framework? Whatever the reason, the government benefited to the tune of an average of $EC4 million each year, whilst it is estimated that the overall economy would have experienced an average annual income of over $EC25 million (my emphasis added)."*

of all concerned the conduct of undesirable activities in the jurisdictions that offered offshore financial services. Since then the phrase 'International Finance Center' was coined to describe the range of financial activities being conducted in offshore jurisdictions and the global demand for the services offered. Notwithstanding the foregoing, the terms, Tax Havens, OFCs and International Finance Centres are used interchangeably depending to a large extent on the perception that the person using the word would have for offshore financial services. Whenever, that perception is clearly unfavourable the term Tax Haven[108] is frequently used. Otherwise, the terms OFCs and International Finance Centres are the preferred terminologies. For the purposes of this thesis the term OFC will be used.[109]

1.2.2 What is Offshore?

To a person involved in international finance the word offshore means another jurisdiction in which some special tax or other financial advantage is offered to the investor. For example, to a resident of St. Vincent and the Grenadines, the United Kingdom and the United States of America are offshore jurisdictions in which special tax or other financial advantages may be obtained. However, under the offshore laws (see chapters 3 and 4) of SVG a resident of SVG may not be entitled to the tax or other benefits[110] which may be available in the SVG OFSS. Effectively, in the world of international finance, offshore refers to anywhere that is not onshore and usually onshore represents the jurisdiction that the investor or prospective investor is endeavouring to avoid.[111] The OECD defines an OFC as a jurisdiction actively making itself available for the avoidance of tax which would otherwise be paid in relatively high taxed countries.[112] On the other hand the U.S Treasury Department describes an OFC as a country with:[113]

- low or no taxes on income, profits, capital gains, estates;

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[108] OECD Report "Harmful Tax Competition an Emerging Global Issue" ,1998.

[109] Hampton M., "Treasure Islands or Fool's Gold: Can and Should Small Island Economies Copy Jersey?" World Development, 1994, vol. 22, No. 2, pp 237-250 at p. 237, *"The difference between OFCs and tax havens is sometimes unclear. Generally we can note that tax havens are based upon taxation differentials between States. They are usually jurisdictions that have low or no direct taxes. Tax havens may or may not host a range of financial services. Conversely, an OFC, it is a 'functional centre' may host a mixture of activities such as international banking, offshore fund and trust management, law firms etc. In short, there is a varied economic base rather than just taxation advantages."*

[110] See International Banks Act 1996 and the International Trusts Act 1996.

[111] United Nations Office for Drug control and Crime (UNDP) "Financial Havens, Banking Secrecy and Money-Laundering" 1998 at p. 21 where offshore banking was defined in the following manner: *"In popular use, 'offshore banking' is often taking to mean nothing more than persons resident in one legal jurisdiction holding assets in financial institutions incorporated in another jurisdiction."*

[112] OECD Report, "Harmful Tax Competition – An Emerging Global Issue" 1998, at p. 20, paras 42-43

[113] Higgins K., "Offshore Financial Services, An Introduction," The Counsellors Ltd., 1999 at p 5

- few or no tax information exchange treaties;
- a high level of banking secrecy;
- Self promotion as an offshore financial centre;
- a disproportionately large financial sector;
- the absence of exchange controls on foreign currency deposits

It is however important to note that the OECD's definition and the USA Treasury's description, though adequate in their assessments of the functions that were performed by OFCs, were mainly pronouncements of their dissatisfaction with the financial activities that were provided by OFCs. Whether that description and definition adequately captured the roles and functions of the current structure of OFCs, especially with the intense pressures from the FATF and OECD grouping of countries, remain very doubtful indeed. It is rather uncanny that the perception of the OECD and FATF as outlined in the description and definition of OFCs, is one that this thesis is striving to preserve amidst the rapid legislative changes that OFCs are experiencing. Such changes, as will be shown later, have either significantly diluted or removed some of the features of OFCs that are intrinsic in the description and definition given.

Having briefly reviewed the definitions of offshore and OFC, offshore financial services can be defined as those services that are provided by financial and legal professionals and administrative staff for the purposes of maximizing the returns of non-resident investors who have invested in an OFC. These services may include legal and financial advice on investments and investment structures and registration, administration and management of companies (insurance included), trusts and mutual funds just to name a few.

1.3 Historical Background

The origins of modern offshore financial services in the Caribbean region can be traced back to 1927 with the establishment of a captive insurance[114] in Bermuda. Palan

[114] An insurance that is established for the purposes of insuring the activities of its owners and the insurable interests of the employees of its owners.

however expressed the view that OFCs are not new.[115] He claimed that even all the way back to Roman times there is evidence of wealthy individuals using other polities as tax havens.[116] If the tax advantage is the main reason for the establishment of an OFC, then it is reasonable to presume that the origins of an OFC can be traced back to 1868 when all direct taxation was abolished by Charles III of Monaco.[117] The abolition of taxation and the beautiful Mediterranean weather together attracted the wealthy to the shores of Monaco where they invested and for the most part resided in order to acquire the benefits associated with the advantage of no taxation.[118]

During the late nineteenth century the smaller States in the American Union including, New Jersey, Delaware, Rhode Island, Maine and West Virginia enacted liberal corporate laws in competition with each other to attract corporate entities.[119] These laws were beneficial to corporations that were in the export business[120] and were established on fundamental principles that are similar to modern OFCs. In order to raise funds New Jersey during the 1880s enacted laws that were more liberal than the laws of other states to enable it to attract investors and made it advantageous for corporations to be registered there.[121] Similar laws as those that were passed in New Jersey in the 1880s were subsequently (1898) enacted by Delaware[122] which is still an offshore jurisdiction today.

It was not, however, until after 1929 that the modern offshore finance sector commenced the crusade that brought it to where it is today.[123] Following a House of Lords decision in the case **Egyptian Delta Land and Investment Co Ltd v Todd**[124] the modern OFCs actually began to take shape. In that case the House decided that if a company was registered in Britain but its directors and secretary permanently resided elsewhere it was exempt from taxation. Consequently, there was a proliferation of companies seeking to take advantage of those opportunities in Britain, thus turning it into an offshore finance centre. By virtue of that ruling those opportunities were also

[115] Palan R, "Tax Havens and the Commercialization of State Sovereignty," International Organisation 56.1 (2002) 151-176, at p. 158
[116] Ibid
[117] Ibid
[118] Ibid
[119] Ibid
[120] Ibid
[121] Ibid
[122] Ibid
[123] Ibid
[124] [1929] AC 1: [1928] 1KB 152: [1928] 14 TC 119

created for the territories of the British Empire and they too (e.g. Bahamas and Bermuda) joined into the act. Offshore financial services emerged as it is known today for two reasons, namely private banking and euro-currency banking. Private banking concerns the management of assets for high net worth individuals.[125] Eurocurrency banking refers to the international deposit and lending of funds in all of the major currencies.[126]

1.3.1 Private Banking

During the French revolution the Swiss offered private banking secrecy to the French aristocrats for a fee.[127] Private Banking actually started in Switzerland during the Bolshevik revolution when there was an exodus of capital from Russia to Switzerland.[128] Further, instability in the Balkans and Latin America coupled with the Nazi threat in Germany all accounted for capital flight to Switzerland. Many were afraid that with the constant invasion of European countries by Germany they would have lost their assets through confiscation or otherwise and therefore chose to deposit their assets elsewhere for safe keeping and asset protection.[129]

There were further political and economic changes taking place in Europe, the United Kingdom and North America which precipitated the flow of funds from those areas offshore. In England and Europe there was a procession towards, socialist, political regimes and ideologies and a significant increase in the influence of Trade Unions on government policies. This socialist thinking was heavily founded on the welfare state, where provisions had to be made by the State for improvement in education, health, housing and the general welfare of the citizens of the State.[130] The first and second world wars also resulted in extensive capital outlay, especially in Europe, to rebuild that which was lost and destroyed. The rebuilding process coupled with the introduction of the welfare state forced governments of the day to seek funds to finance those activities. Increased taxes were the easiest and quickest method of raising the funds that were needed.[131] Many wealthy citizens of those countries as a result of increased taxation

[125] Valdez S., "An Introduction to Global Financial Markets" Palgrave, 3rd edn. 2000, at pp. 16 and 95
[126] Ibid p. 133
[127] Palan R, "Tax Havens and the Commercialization of State Sovereignty," International Organisation 56.1 (2002) 151-176, at p. 160

[128] Higgins K., "Offshore Financial Services, An Introduction," 1999 at p. 1
[129] Ibid
[130] Ibid
[131] Ibid

began investing in private banking and on the Eurocurrency markets in order to avoid and escape the draconian taxation levels of those countries and at the same time maximize the returns on their investments.[132]

Canadian and British interests were at the forefront of the commencement of the offshore finance sector in the Caribbean when in 1936 The Bahamas General Trust Company was formed in the Bahamas.[133] The name was later changed to Roywest Banking, a joint venture of National Westminster Bank of Britain and Royal Bank of Canada and then to Coutts and Co a wholly owned subsidiary of National Westminster Bank. The entity was established to provide investment management services to wealthy clients in both the European and North American Markets. The provision of private banking services in the offshore sector therefore provided a safe haven for capital fleeing both from political and taxation risks by enabling persons with high net worth to protect their income and assets in jurisdictions separate and distinct from their original country of residence.

1.3.2 The Eurocurrency Market

The Eurocurrency market emerged after the 2nd World War and during the inception of the cold war.[134] The Central Banks of the Communist countries became very concerned about maintaining their US dollar deposits in New York Banks for fear that such an action exposed them to political and financial risks.[135] The US has a history (e.g. Kuwait, Haiti and Iraq) of freezing the accounts of persons, institutions or countries whenever there was a disagreement with the USA.[136] Therefore, in the late 1950s and early 1960's the communist block countries decided to deposit their US dollar balances with their bankers in London and Paris.[137] With Russia owning a bank in France, Bank Commercial pour l'Europe du Nord, it was able to place its deposits there and to use that bank to lend US Dollars to other non-US banks in Europe.[138] Thus the term

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[132] Higgins K., "Offshore Financial Services, An Introduction," 1999 at pp. 1-2
[133] Ibid
[134] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 133
[135] Ibid
[136] Higgins K.., "Offshore Financial Services, An Introduction," 1999 at p. 2
[137] United Nations Office for Drug control and Crime (UNDP) "Financial havens, Banking Secrecy and Money-Laundering" 1998 at p. 22
[138] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 133

Eurodollar[139] was used to refer to a US dollar on deposit in Europe rather than in the United States.

After the 2nd World War there was a tremendous amount of US dollars circulating in Europe, mainly because of the US Dollars that were introduced to rebuild Europe under the Marshall Plan.[140] Consequent upon the Treaty of Rome 1957,[141] there was an influx of American multinational corporations being established and operating in Europe, earning and spending vast sums of US Dollars.[142] The availability of these large amounts of US Dollars provided a ready market for businesses and even governments[143] wishing to acquire US Dollars by way of loans.[144] As a result of the increased demand for the US currency, the US government passed the Interest Equalisation Act in 1963 which imposed interest rate controls in an attempt to restrict the outward flow of capital.[145] The strict control of such rates was called Regulation Q.[146] For quite a number of years there were restrictions on the interest rates that could be offered to depositors. But although the US introduced other controls[147] businesses were however able to circumvent Regulation Q by choosing not to convert the Dollars into Francs but lending them to other institutions on deposit.[148] There are a number of other reasons why the Eurocurrency market developed. These reasons were given by Kevin Higgins[149] as:

- Restrictions on the use of Sterling by non-residents of the United Kingdom
- A series of devaluations of the pound sterling which removed both the stability and predictability of the value of the pound sterling-this therefore resulted in the US dollar becoming the new international unit of account for world trade although the United Kingdom remained the pre-eminent financial centre.

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[139] Kenwood A., and Lougheed A., "The Growth of the International Economy 1820-2000" Routledge, 4th edn. 1999 at p. 274. where a Eurodollar is defined as; "*...a time deposit denominated in U.S dollars placed in a bank located in another country, for example, in Britain. As a time deposit it cannot be used by its owner during the period of the deposit but it can be lent out by the bank to others who may require dollars for transactions purposes.*"
[140] Trebilock M., Howse R., "The Regulation of International Trade" Routeledge, 2nd, edn. 1999 at p. 23
[141] Ibid
[142] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 133
[143] Ibid, "*In 1991, Kuwait raised a hugh dollar loan, $5.5bn, from a syndicate of banks in London to repair the damage caused during the Gulf War.*"
[144] Kenwood A., and Lougheed A., "The Growth of the International Economy 1820-2000" 1999 at p. 274-275
[145] Ali S., "Money Laundering Control in the Caribbean," Kluwer Law International, 2003 at p. 30
[146] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 133
[147] Ali S., "Money Laundering Control in the Caribbean," Kluwer Law International, 2003 at p. 30 where mention was made about the other controls imposed by the Voluntary Credit Restraint Program and the Foreign Direct Investment Program which were introduced in 1965.
[148] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 133
[149] Higgins K, "Offshore Financial Services, An Introduction," 1999 at pp 3-4

- Balance of payments deficits experienced by the USA in the 1960s which resulted in serious efforts to stem the flight of capital by imposing a number of currency restrictions on capital. Those restrictions left investors in some cases with no other alternative than to establish a branch or subsidiary overseas which would not be subject to U.S regulatory authority.

- The increase of the price of oil in the 1970s resulting in a massive international redistribution of wealth. Those countries that were members of OPEC experienced large balance of payments surpluses and those countries that were not members of OPEC experienced serious balance of payments deficit. Due to the fact that petroleum products are internationally priced and traded in US dollars there was an increase in the supply of offshore US dollar deposits from exporting countries as well as an increase in the demand for US dollar denominated credits by importing countries.

- The Eurocurrency market is not subject to any national monetary regulatory authority.

- There are no legal reserve requirements.

- No deposit premiums are required.

- No restrictions on levels of interest rates

- No taxes on income, profits or capital gains

- The market deals in large deposits and credits of one million currency units or more while avoiding the costs of a retail or branch network.

The Eurocurrency market is now developed to the extent whereby it is not only traded in US Dollars but all of the freely convertible international reserve currencies.[150] Thus although the US Dollar remains the single largest denomination, the Eurocurrency has now become any internationally accepted currency held on deposit outside its country of issue. For example the Euro-Yen refers to the Japanese Yen placed on deposit outside of Japan.[151]

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[150] Valdez S., "An Introduction to Global Financial Markets" 2000 at p. 146

[151] Kenwood A., and Lougheed A., "The Growth of the International Economy 1820-2000" 1999 at pp. 274-275; *"The Growth of Western Europe, especially in the 1960s and 1970s, was partly financed with Eurodollars. By 1995 the market for Eurodollars had grown to around $4,000 billion. Other Eurocurrencies, such as the deutsche mark, Sterling, Swiss franc, and the yen have appeared and have grown in importance since the 1960s and, in 1995, the total was around $2,000 billion. The introduction of the new European currency, the euro has led to the dropping of the term 'eurocurrencies' from reports in favour of cross-border bank claims and liabilities."*

1.3.3 Why go offshore?

In addition to the reasons aforementioned persons wishing to invest may go offshore for, asset protection[152] from creditors[153] and spouses,[154] avoidance of forced heirship rules, tax planning purposes,[155] more favourable legal systems,[156] lower transactions costs,[157] professional expertise, banking, insurance,[158] investment, ship management and registration, trustee services, avoidance of religious restraints, escaping bureaucratic regulations and exchange control planning. There are also those who go offshore for undesirable reasons such as, laundering the proceeds of crime, fraud and concealment of assets from partners and family members.

The development of the Eurocurrency banking and private banking sector did not commence in small island economies (SIEs) OFCs but in the developed financial centres such as London and Switzerland (see chap 1.3.2). Today, there has been very little change in that regard since both London and Switzerland are still engaged significantly in the provision of those financial services. It is rather uncanny that Eurocurrency banking is not viewed in the same way as offshore banking in OFCs, yet on the basis of the foregoing, there seems to be very little or no regulation of the Eurocurrency banking operations (see chap 1.3.2). Whereas in the offshore banking that is conducted in the OFCs, there are and always had been regulations governing offshore banking operations.

It is interesting to note that President Kennedy in July 1963 in recognition of the advantages that were taken of the US Dollar in Europe decided to tax dollar bonds

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[152] Ali S., "Money Laundering Control in the Caribbean," 2003 at p. 40

[153] Ibid at p. 40 *"Since the beneficial ownership in trust property passes to the beneficiaries, it falls outside the ambit of the settlor's or trustees assets in the event of a claim against such assets... also a debtor may seek to place his wealth safely away from creditors by the use of an offshore trust. This is because the beneficial ownership in trust property resides in the beneficiaries and not in the settlor/debtor."*

[154] UNODCCP Report, "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 9, where it is stated that one of the most common purposes for the establishment of offshore trusts is to dodge decisions of the divorce courts.

[155] Ali S., "Money Laundering Control in the Caribbean," 2003 at p. 39

[156] Higgins K., "Offshore Financial Services, An Introduction," 1999 at p. 13

[157] Ibid at p. 19

[158] Ali S., "Money Laundering Control in the Caribbean," 2003 at p. 39; *"Many of the offshore Caribbean havens have an active captive insurance industry, that is an insurance business where by all risks and premiums originate outside the jurisdiction, and where the company is owned mostly by non-residents. In many cases the captive company is a wholly owned subsidiary of a foreign company and the structure is invoked as a tax avoidance scheme."*

(otherwise called yankee bonds) that were issued in the US by non-residents of the USA. The immediate response by those operating in the Eurocurrency banking sector was to issue those bonds in Europe to escape the tax.[159] It is reported that in 1963 the first Eurobond for the amount of $15 million was managed by Warburg's and issued in London to an Italian company, Autos trade. This issue placed London as the most appropriate financial centre for doing that type of business. As Al Alletzuhauser expressly stated:

> *"Almost overnight the world's financial centre shifted to London. The big four Japanese stockbrokers wasted no time in setting up offices there. If they could not sell Japanese stock to the Americans, they would sell them to the Europeans. Over the years, it proved to be one of the most profitable moves Japan's brokers ever made abroad."*[160]

The success of London as an international finance centre for euro-currency banking appears to be the main reason for the establishment of a number of foreign banks in Britain. It has been reported[161] that in 1950 there were 140 foreign banks in London but since then that figure increased to 340 by 1973 and 541 by 2000. It is estimated that euro-currency dealings have increased from $1bn in 1959 to $6 billion by 1992 and is still a very viable industry even after the US abolished the restrictions which occasioned the rapid growth in euro-currency banking in the first place.[162]

Those institutions that are and have been providing euro-currency banking operations, have been successful and so have London and other European countries in which euro-currency banking is being conducted.[163] This success came due to the ingenious ways in which those institutions were able to avoid any kind of regulation that will minimize their returns and pose a threat to the safe keeping of their assets, in this case the euro-dollar. There are indeed parallels to be drawn here between the euro-currency banking being conducted in Europe and the private international banking being conducted in OFCs. Both operations are established for the purposes of asset protection, tax avoidance, minimisation of transaction costs and ultimately, the maximization of returns. The major difference is that private international banking in OFCs is regulated.

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[159] Valdez S., "An Introduction to Global Financial Markets" 2000 at pp. 133-134.
[160] Ibid at p. 134.
[161] Ibid
[162] Ibid
[163] Kenwood A., and Lougheed A, "The Growth of the International Economy 1820-2000" 1999 at pp. 274-275;

Given the sizeable sums of monies which are transacted through euro-currency banking operations and the lack of regulatory controls, there is a greater need for deeper scrutiny of those operations than those of offshore banking in the OFCs. What is however most interesting about the development of offshore financial services is that certain members of the OECD and FATF have introduced it, were actively involved in it, availed themselves of the opportunities that were derived from it, developed it and still provide such services. Moreover, it is also noticeable that their involvement in the provision of offshore financial services was predicated on tax avoidance, asset protection and an unregulated financial environment. Those three underlying factors were more successfully achieved in an environment of privacy and confidentiality. It is therefore rather duplicitous that those same member States[164] of the OECD and FATF, having developed their wealth in that way, are now vilifying OFCs for following in their footsteps.

1.3.4 Offshore Finance Centres

Over the past 20 years many SIEs have depended significantly on offshore financial services for their economic survival.[165] Some countries have been providing such services for over forty years[166] but others[167] have more recently diversified their economies into offshore financial services since they considered it an economic sector that could be used to compete more effectively with developed countries. In this way, some OFCs have attempted to meet the challenges with which they are faced as a consequence of the Word Trade Organisation's(WTO)[168] rulings on free trade and the removal of trade barriers. Further, the process of globalisation occasioned by the rapid growth in technology, the expansion of transnational companies, the forging of economic unions and the constant removal of geographical boundaries to enable an easier flow of labour, products and capital to and from countries have all affected Caribbean OFCs.

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[164] These countries include, France, Germany, Italy, Japan, Russia, UK and the USA

[165] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens and the Re-configuration of Global Finance" - World Development Vol. 30, No.9 pp. 1657-1673, 2002 at p 1657- Where it was stated that Jersey has over 90% of its government revenues originating from offshore activities and 20% of local labour force also employed in the activities of offshore finance.

[166] Bermuda and The Bahamas

[167] St.Vincent and the Grenadines, Dominica, Grenada, St. Kitts and Nevis, St. Lucia

[168] see chapter 4 for discussion

Those economies that have been providing offshore financial services for a considerably long period of time have been able to take advantage of the opportunities that are available through the process of globalisation. The other countries that placed significant emphasis on other economic sectors such as light manufacturing, agriculture and tourism are experiencing severe difficulties with economies of scale.[169] They soon enough discovered that with the free movement of labour, capital and products and the rapid improvement in technology, especially relating to telecommunications, the markets that they once had were beginning to decline with rapidity. Consequently, they were either forced to significantly improve their offshore financial services sectors to make them more marketable or to diversify into offshore financial services. These efforts are designed to recoup revenues that the other economic sectors are losing as a result of the process of globalisation and the rulings of the WTO. But there are those who are sceptical about the significance of the OFSS to small island OFCs. As one writer expressly stated;

> *"Moreover, many small countries riddled with poverty and debt, have looked to new economic alternatives to save them. Typically these include tourism and now the provision of offshore financial services. The redeployment of resources into the latter has created a myriad of opportunities for criminals to both disguise the origins of funds and place them out of the reach of western jurisdictions."*[170]

Many SIEs followed the path that leads to the provision of offshore financial services. The demand for such services was relatively high, especially in the early to mid 1980s and the 1990s with the increase in private capital flows.[171] The 2000 Merrill Lynch Gemini Study has reported that the number of US Dollar millionaires in the world economy has increased by 50% between 1997 and 2000 to a current total of approximately seven million millionaires.[172] The rapid expansion of the world economy continues to increase global wealth and further enhancing growth in the offshore world. The International Monetary Fund (IMF) has also reported that cross border assets and liabilities in offshore banks increased by 6% annually during 1992-1997 to approximately $US5 trillion in 1997.[173] A British report of 1998 has also estimated that

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[169] Dominica, Grenada, St. Kitts and Nevis, St. Vincent and the Grenadines
[170] Lilley P., "Dirty Dealing, The Untold Truth About Money Laundering" 2000, at p. 4
[171] Kenwood A., and Lougheed A., 'The growth of the international economy 1820-2000' Routledge 199 4th edn., at p. 321
[172] Hay R, "OFCs -The Supranatural initiatives" Private Client Business. 2001,2, 75-90 at p. 90
[173] Ibid at p. 2

the amount invested offshore exceeded $6 trillion. At that time it was estimated to be more than the GDP of every country in the world except USA.[174]

Other factors positively affecting demand include, the low or no tax rates of small island economies offshore centres compared to the relatively high rates of taxes that were imposed on tax payers in the developed countries, technological advancements in the banking system occasioned by the speed and ease with which monies can be transferred around the world, banking secrecy, confidentiality and anonymity. Together, those factors created the environment that was conducive to investors. The only ingredient that was required by SIE OFCs was to ensure that their offshore legislation reflected those factors. Accordingly, many of them, especially in the Caribbean region, either amended or introduced new legislation that imposed no or low taxes where taxes previously existed. They further extended banking secrecy and established confidentiality laws with stringent penalties for unauthorised disclosure of the affairs of investors.[175] Additionally, the legislation that regulated offshore entities omitted certain registration, licensing and incorporation requirements that were considered to be onerous.[176] In this way the regulators were able to respond with great speed and accuracy to the demands of investors for the registration of offshore entities and offshore structures.

Most if not all of the SIEs with offshore finance sectors have very poor financial market arrangements and therefore acquiring funds for investment purposes in the private and public sectors proves very difficult.[177] Consequently, there is very little scope for the introduction of monetary policies that will vary the cost and availability of credit to affect aggregate monetary demand and achieve the desired employment levels. These islands are left with the only feasible macroeconomic tool - fiscal policy. It is this policy that is used to create fiscal incentives in order to encourage foreign direct investment and generate the desired investment levels to "kick start" the economies and to enable them to continue to flow relatively smoothly.

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[174] Neocleus E, "Off-shore Financial Centres-Recent Developments"- J.I.B.L 2002, 17(5), 136-139 at p 136

[175] Hampton M, & Levi M, "Fast Spinning into Oblivion? Recent developments in money-laundering policies and offshore finance centres"- Third World Quarterly, Vol 20, No 3, pp 645-656 1999

[176] see Chapter 3 and 4

[177] Ibid

The tax incentives coupled with the favourable legislation and political environment encouraged investors to establish investment vehicles in these OFCs. These investments attracted no taxes or very low taxes and by and large escaped taxes in the developed countries from which the funds to finance these investments originated. The confidentiality and banking secrecy laws accorded to investors anonymity and a greater sense of security. Thus, it conveniently enabled investors to minimize their tax liability and maximize their returns. These advantages to investors are not however seen in a favourable light by governments of the G7 countries. For example, the majority of OECD countries view the offshore legislation as encouraging their citizens and residents to engage in tax avoidance and tax evasion with impunity.

This seems rather strange when members of the OECD have encouraged these OFCs to diversify into areas in which they will be able to compete effectively with developed countries. Britain at one time encouraged its dependent territories to establish offshore financial regimes to reduce their dependence on British aid.[178] It appears however, that those dependent territories have now fallen vulnerable to the European Union's (EU) initiative on exchange of unrestricted tax information. In 2000 at a meeting in Portugal, EU member States agreed to unrestricted information exchanges between the national tax authorities as an alternative to implementing a trans-EU withholding tax on non-residents savings. The British government having played a significant role in arranging and negotiating that initiative was therefore forced by the EU and the USA to encapsulate its dependent territories within this EU initiative.[179]

1.4 The OECD's Harmful Tax Initiative

The OECD complained that vast sums of money having been transferred from its member States to be invested in OFCs are then structured in such a way that the ownership of those funds become so concealed that without assistance from OFCs it is virtually impossible to identify the beneficial ownership of those funds. Consequently, fewer funds will fall to the incidence of tax,[180] thus significantly eroding the tax bases of

[178] The Gallagher report(1990) Commissioned by the British Foreign and Commonwealth Office.
[179] Hampton M., & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance." World Development vol. 30, No. 9, pp. 1657-1673, 2002 at pp. 1659-1660.
[180] OECD Report, *"Towards Global Tax Co-operation"* 2000 at p. 14, para. 24; *"Countries face public spending obligations and constraints because they have to finance outlays on, for example, national defence, education, social security, and other public services. Investors in tax havens, imposing zero or*

its member States. Accordingly, in 1998 it launched the harmful tax initiative against these OFCs following the publication of a Report entitled "Harmful Tax Competition, An Emerging Global Issue." In this Report amongst other things, the OECD established five criteria for determining whether an OFC was engaging in harmful tax competition. These are as follows:[181]

> (a) *"No or low taxes on relevant income.*
> (b) *Lack of effective exchange of information -Tax Havens typically have in place laws or administrative practices under which business and individuals can benefit from strict secrecy rules and other protections against scrutiny by tax authorities thereby preventing the effective exchange of information.*
> (c) *Lack of transparency- A lack of transparency in the operation of the legislative, legal and administrative provisions is another factor in identifying tax havens.*
> (d) *No substantial activities – The absence of a requirement that the activity be substantial is important since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven.*
> (e) *Ring fencing – The fact that a country feels the need to protect its own economy from the regime by ring-fencing provides a strong indication that a regime has the potential to create harmful spill over effects. Ring-fencing may take a number of forms including: (i) a regime may explicitly or implicitly exclude resident taxpayers from taking advantage of its benefits; (ii) enterprises which benefit from the regime may be explicitly or implicitly prohibited from operating in the domestic market."*

However, in a subsequent Report[182] it abandoned the ring- fencing criterion and concentrated only on (a), (b), (c) and (d) above. This was after there was significant opposition from four of its own members[183] and from OFCs. In that regard Switzerland criticised the harmful tax initiative in the following manner:

> *"The Report [meaning the 1998 OECD Report] recognises that each state has sovereignty over its tax system and that levels of taxation can differ from one state to another. However, that same Report represents the fact that tax rates are lower in one country than another as a criterion to identifying harmful preferential tax regimes. This results in unacceptable protection of countries of high levels of taxation, which is, moreover, contrary to the economic philosophy of the OECD."*[184]

In the 2000 Report the OECD having evaluated the tax regimes of 47 jurisdictions[185] that it considered to be in the tax haven category, listed 35[186] of them, including SVG,

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nominal taxation, who are residents of non-haven countries, may be able to utilise in various ways those tax haven jurisdictions to reduce their domestic tax liability. Such tax payers are in effect "free riders" who benefit from public spending in their home country and yet avoid contributing to its financing"

[181] Ibid at pp. 23 and 27-Boxes I & II

[182] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 10

[183] Switzerland, Luxembourg, Belgium and Portugal

[184] OECD Report, "Harmful Tax Competition an Emerging Global Issue- Synthesis and Summary of Recommendations statement by Switzerland, http://www.oecd.org/daf/fa/tax_comp/taxcomp.htm.

[185] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 10

[186] Ibid at p. 17, where the countries included are; Antigua, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat,

as uncooperative tax havens and recommended that certain defensive measures should be taken against them.[187] The inclusion of SVG on that list raises three questions. Firstly, was it correct to categorise SVG as an 'uncooperative tax haven?' In that regard the OECD contended that:

> *"The fact that a jurisdiction may impose no or nominal tax on the relevant income is a necessary but not sufficient condition for the jurisdiction to be considered a tax haven. Whether a jurisdiction meets the tax haven criteria is determined based on all the facts and circumstances, including whether the jurisdiction has a significant untaxed offshore financial/other services sector relative to its overall economy.*[188]

Secondly, did the OECD have the legal authority to dictate the tax regime that SVG should implement in the interest of its people? Thirdly, was the international condemnation of SVG coupled with threats of defensive measures in conformity with international law? In this chapter the first question will be considered and a brief response will be given to the second question. However the second and third issues will be examined more extensively in chapter 6.

1.4.1 Is SVG a Tax Haven?

In determining whether SVG should have been categorised as an uncooperative tax haven, it may well be most instructive to start with a definition or description of a tax haven. Thereafter, an assessment of the factors identified by the OECD as being characteristics of a tax haven will be measured against the tax regime and the overall economy of SVG. Hampton distinguishes an OFC from a tax haven in the following manner:

> *"The difference between OFCs and tax havens is sometimes unclear. Generally we can note that tax havens are based upon taxation differentials between States. They are usually jurisdictions that have low or no direct taxes. Tax havens may or may not host a range of financial services. Conversely, an OFC, if it is a 'functional centre' may host a mixture of activities such as international banking, offshore fund and trust management, law firms etc. In short, there is a varied economic base rather than just taxation advantages."*[189]

Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Kitts and Nevis, St. Lucia, St.Vincent and the Grenadines, Tonga, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

[187] Ibid at pp. 24-25

[188] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 10

[189] Hampton M., "Treasure Islands or Fool's Gold: Can and Should Small Island Economies Copy Jersey?" World Development, 1994, vol. 22, No. 2, pp 237-250 at p. 237,

The OECD and Hampton alike accepted that it is difficult to attribute a definition to tax havens and therefore they have chosen to make certain distinctions in order to provide a satisfactory description of a tax haven. In that regard the OECD stated that:

> *"While the concept of 'tax haven' does not have a precise technical meaning, it is recognised that a useful distinction may be made between, on the one hand, countries that are able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence and, on the other hand, countries which raise significant revenues from their income tax but whose tax system has features constituting harmful tax competition. In the first case, the country has no interest in trying to curb the "race to the bottom" with respect to income tax and is actively contributing to the erosion of income tax revenues in other countries...Because of this difference, this report distinguishes between jurisdictions in the first category, which are referred to as tax havens..."*[190]

Hampton and the OECD have essentially described tax havens as jurisdictions in which no or nominal taxes are imposed. In SVG the higher rate of tax in the domestic financial services sector is 40% and it reduces, depending on the level of taxable income. However, offshore entities are exempt from the payment of income tax (see chapter 3) but their employees are not. To say, as expressly indicated by the OECD, that SVG offers itself as a place 'to be used by non-residents to escape tax,'[191] gives the impression that the sole purpose behind the establishment of the OFSS was to deliberately entice tax payers away from their fiscal obligations to OECD member States. That appeared not to be the case. It has already been demonstrated earlier in this chapter that SVG badly needed to diversify into another economic sector to recoup the loss that is being sustained from falling revenues in the banana industry. Moreover, the economy needed to stimulate investment in order to reduce unemployment and poverty levels. The differences in tax rates that are imposed by SVG represent concessions to those wishing to maximise their returns. This is a common feature that can be found in the economic policies of many countries and is recognised in the OECD as desirable. In that regard the report stated:

> *"The Committee recognises that there are no particular reasons why any two countries should have the same level and structure of taxation. Although differences in tax levels and structures may have implication for other countries, these are essentially political decisions for national governments. Depending on the decisions taken, levels of taxation may be high or low relative to other states and the composition of the tax burden may vary. The fact that a country has modernised its fiscal infrastructure earlier that other countries, for example by lowering the rates and broadening the base to promote greater neutrality, is principally a matter of domestic policy. Countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in so doing."*[192]

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[190] OECD Report, "Harmful Tax Competition an Emerging Global Issue" p. 20 paras 42-44
[191] Ibid at para 42
[192] Ibid at p. 15 para 26

The OECD did not however stipulate what it meant by *"internationally acceptable standards."* In that regard, it will be established in chapter 6.5 that SVG was not in anyway departing from its international legal obligations concerning international taxation. Instead, its fiscal policy was consistent with the international legal principles which relate to international taxation.

The economy of SVG is managed through its fiscal policy, which is adjusting taxes to affect the amount of money that is circulating in the economy.[193] Unlike the member States of the OECD, SVG does not have at its disposal the luxury of using either a monetary policy[194] or a combination of monetary and fiscal policy to influence the economy. Therefore, it is only by adjusting taxes that SVG can influence levels of economic activity. That perspective has been recognised by the OECD when it stated that:

> *"Tax competition and the interaction of tax systems can have effects that some countries may view as negative or harmful but others may not. For example, one country may view investment incentives as a policy instrument to stimulate new investment, while another may view investment incentives as diverting real investment from one country to another. In the context of this last effect, countries with specific structural disadvantages, such as poor geographical location, lack of natural resources, etc., frequently consider that special tax incentives or tax regimes are necessary to offset non-tax disadvantages, including any additional cost from locating in such areas. Similarly, within countries, peripheral regions often experience difficulties in promoting their development and may, at certain stages in this development, benefit from more attractive tax regimes or tax incentives for certain activities. This outcome, in itself, recognises that many factors affect the overall competitive position of a country. Although the international community may have concerns about potential spill over effects, these decisions may be justifiable from the point of view of the country in question."*[195]

In the light of the fact that SVG can only finance its public expenditure by raising both direct and indirect taxes it can be strongly contended that SVG does not fall into the tax haven category established by the OECD. Due to the fact that SVG provides a wide range of financial services, for example, international banking, international trusts, mutual funds, shipping and international insurance, along with the management of other entities, such as international business companies it is more likely to fall within the category of OFC as described by Hampton. Having contended that SVG does not fall

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[193] Parkin M., Powell M., and Matthews K., "Economics" 2003, at p. 418

[194] Ibid - where it is stated that 'monetary policy,'- *"consists of changes in interest rates and in the amount of money in the economy."*

[195] OECD Report, "Harmful Tax Competition an Emerging Global Issue" p. 15 para 27.

into the OECD's tax haven category, attention can now be drawn to considering whether the factors that the OECD identified as characteristics of a jurisdiction that is engaged in harmful tax competition are applicable to the tax regime in SVG.

1.4.2 Characteristics of an Uncooperative Tax Haven

Earlier in this chapter reference was made to the *'theory of international cooperation'* as it relates to the FATF's anti-money laundering initiative. Mention was also made of the three principles that underlie that theory, namely, the *principle of regulation, the principle of disclosure* and the *principle of transparency*. It was stated that these three principles needed to be effectively applied to the regulatory and supervisory framework of a jurisdiction before it can be considered to be cooperative in the fight against money laundering. The *theory of international cooperation* also applies to the OECD harmful tax initiative (see 1.0 above). The criteria that are identified by the OECD as determinants of an 'uncooperative tax haven' also fall within the three principles aforementioned. Whereas no or nominal taxes and no substantial activities can be brought within the *principle of regulation*, exchange of information and transparency which are the foundational pillars of the *theory of international cooperation* fall within the *principle of disclosure and the principle of transparency* respectively. Accordingly, the remainder of this chapter will be devoted to discussing issues relating to the *principle of regulation*. Although issues relating to the *principles of disclosure and transparency* will be introduced at this stage they will be more extensively discussed in chapters 4 and 6. Despite the fact that chapter 4 specifically relates to the anti-money laundering initiative of the FATF the discussion will nonetheless be relevant to the OECD's harmful tax initiative.

1.4.2.1 No or nominal taxes

This criterion falls within the principle of regulation due to the fact that some form of regulation is necessary to institute SVG's fiscal policy wherefrom the decision to tax, the rate of tax or not to tax is outlined. All of the arguments that were proffered above at paragraph 1.4.1 and which concerned, no or nominal taxes are also relevant in this instant. By no or nominal taxes the OECD appears to be referring to a jurisdiction that does not impose any income tax or if it does, the rate of tax is minimal. This criterion raises two questions. Firstly, consideration must be given as to whether the OECD can dictate the economic policies of SVG. Secondly, what could have been the reason for exempting offshore entities from taxation and whether those are the only facilities that are the beneficiaries of such exemption?

In response to the first question, under international law, every State has a wide discretion to introduce the economic policies that it considers will meet the social, political, economic and cultural needs of its peoples (see chapter 6.8 for further discussion).[196] In implementing those policies, harm may be caused to the economy of other countries but that does not in anyway affect the wide discretion that States possess, unless the said policies are inconsistent with their international legal obligations.[197] Under international law it has been noted that, *'restrictions upon the independence of States cannot therefore be presumed'*[198] and therefore the OECD member States should not be restricted from conducting their relationships with any other State in the manner that they consider appropriate to their interests.[199] This does not, however, accord to the OECD member States the automatic right to retaliate with countermeasures. Any such retaliation is governed by certain international legal rules (see chapter 6.7)[200] to which the injured State[201] is required to conform, and failing so to do may be interpreted as a violation of international law. One of those fundamental rules requires that the responsible State must have breached its international obligations[202] to the injured State before any countermeasures are permitted. There is no evidence that SVG was in breach of any of its international obligations to the member States of the OECD (see chapter 6.5). Therefore, any conduct which can be interpreted as interference into the internal economic affairs of SVG will be seen as a breach of the principle of non-intervention under international law (see chapter 6.5).[203] Accordingly,

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[196] General Assembly Resolution 2131(XX), UNGAOR, 20th Sess., suppl. 14(A/6220), 1965, p 11: See also Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law-Towards international Disciplines" Juris, 2000, at p. 76

[197] OECD Report, "Harmful Tax Competition an Emerging Global Issue" 1998, p. 15 para 27.

[198] SS Lotus Case (France v Turkey) P.C.I.J. Reports, Series A, No. 10 (1927) at p. 18

[199] Elagab O.., "The Legality of Non-Forcible Counter-Measures in International Law" Oxford, 1988 at p. 197.

[200] Crawford J., "The International Law Commissions Articles on State Responsibility-Introduction, Text and Materials" Cambridge, 2002 : ARSIWA Articles 48-53 : See also Gabcikovo-Nagymaros Project (Hungary v Slovakia) Judgment, ICJ Reports (1997), p. 7

[201] Ibid at pp. 23-25 where the definition given to 'an injured state' as being *"any state whose right is infringed by an internationally wrongful act of another state,"* was criticized by Crawford as being problematic.

[202] ARSIWA Article 2

[203] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America), Merits and Judgment, ICJ Reports (1986), p. 14 at para 204

SVG being a sovereign State is legally authorised to dictate its own economic policies without any interference from the OECD (see chapter 6.1).

However, in such a globalised world where there is a growing tendency for States to integrate and form regional blocs for the purposes of enhanced economic opportunities,[204] there may well be a moral obligation to implement economic measures that do not cause any harm to the economies of other States (see chapter 4.14). But there are times when economic harm may be inevitable, although not deliberate.[205] For years now SVG has been pursuing a low tax policy and since 1976 entities that were registered in the OFSS were exempt from paying income taxes. In order to attract foreign direct investment, the Fiscal Incentives Act[206] granted special concessions to any qualified business that establishes its operations in SVG. The hotels have also been granted tax concessions to enable them to improve their facilities and develop tourism generally.[207] Tax concessions have also been granted in the agricultural sector to enable farmers to irrigate their crops and to acquire vehicles and other equipment that will aid them in farming. This also includes exempting farmers from the payment of income tax to encourage them to remain in farming in spite of the falling prices and climatic uncertainties.[208]

In 1998 and 1999 SVG increased the lower rate band for personal income tax from $EC10,000 to $EC11,000 in 1999 and from $EC11,000 to $EC12,000 per annum in 2000[209] such that persons whose annual taxable income do not exceed $EC11,000 and $EC12,000 respectively are exempt from income tax. This was an attempt to leave more money[210] in the hands of the poor,[211] thus reducing their dependency on the State, increasing their spending power and stimulating economic activity. Essentially, the tax concessions that were given above to enable each of the major economic sectors to grow, was in keeping with SVG's overall policy to attract foreign direct investment in order to stimulate sufficient economic activity to create employment and reduce

[204] Tebilcock M., Howse R., "The Regulation of International Trade" 1999, at p. 23
[205] As in the case of SVG where its only form of managing the economy is through its fiscal policies.
[206] Chapter 336 of the 1990 Revised Laws of St. Vincent and the Grenadines.
[207] Chapters 339 and 340 of the 1990 Revised Laws of St. Vincent and the Grenadines.
[208] Response by St. Vincent and the Grenadines to the OECD Report on Harmful Tax Competition, 1999 at pp. 9-10
[209] St. Vincent and the Grenadines Budget Address 1998 at p. 32.
[210] Ibid - where it stated that the standard deduction will leave $EC2.5 million in the hands of taxpayers.
[211] Ibid – over 1,000 persons benefited from the raising of the lower band.

poverty.[212] That the offshore laws were not drafted with the specific aim of encouraging investors to deliberately and fraudulently forego their tax obligations in their respective countries, can be gleaned from the remarks of the former Prime Minister of SVG, Sir James Mitchell, in his welcoming address which was presented at the Caribbean Offshore Conference in Puerto Rico on 21st May, 1997. He stated that:

> *"Those who earned their money legitimately and are seeking a secure and effective vehicle through which such funds can be channelled, will find in SVG the offshore finance capabilities which will provide utmost protection from prying eyes and those engaged in fishing expeditions. It is however important to note, that it is not our desire to benefit from weaknesses that exist in some societies but by the same token, we will not be the guardian of other countries tax laws, since it is the responsibility of each country to effectively administer its own regulatory regime. Our offshore finance authority has been established with the needs of our clients and prospective clients in mind. We are mainly interested in, and receptive to those needs and the fostering of financial strength."*[213]

That statement clearly indicated that emphasis was placed on the OFSS mainly for the purposes of satisfying the economic needs of the country and not to purposely induce tax payers to abdicate their responsibilities to pay tax in their respective countries. SVG lacked the resources that were necessary to function as the tax policeman of the world and under international law it was not obligated to take notice of another country's tax laws.[214] Those issues were also reflected in the aforesaid statement by Sir James Mitchell. Therefore, by reforming the OFSS and exempting all the offshore entities from income tax SVG appeared to be conducting its economic affairs in conformity with its overall fiscal policy of low or no taxation and also in accordance with international law. It therefore raises the question –where is the evidence that SVG's fiscal policy was specifically designed to encourage foreign tax payers to ignore their tax obligations?

1.4.2.2 Exchange of information and Transparency

The OECD's Report[215] in which the 35 countries were listed as 'uncooperative tax havens' did not stipulate whether SVG's regulatory and supervisory framework was lacking in provisions that facilitated the effective exchange of information or was

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[212] Ibid

[213] Mitchell J., "A Season of Light-A series of Messages on Development in St. Vincent and the Grenadines," Concept Publishing Inc. 2001 at p. 62

[214] Holman v Johnson (1775) 1 Cowp 314 at p. 343

[215] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 17

lacking transparency. However, in reference to what this thesis considers to be the *principles of disclosure and transparency,* the Report stated that;

> *"Beyond no or nominal taxation, other key factors in identifying a tax haven are the lack of transparency in the operation of the jurisdiction of the jurisdiction's administrative tax practices and the existence of provisions- whether legislative, legal or administrative – that prevent (or would prevent) effective exchange of information. Because non-transparent administrative practises as well as an inability or unwillingness to provide information not only allow investors to avoid their taxes but also facilitate illegal activities, such as tax evasion and money laundering, these factors are particularly troublesome. Some jurisdictions have enacted laws (e.g., providing anonymous accounts) that prevent financial institutions from providing tax authorities with information about investors. Thus tax administrators lack the power to compel such information from institutions, and they cannot exchange information under tax treaties or under other types of mutual assistance channels. The most obvious consequence of the failure to provide information is that it facilitates tax evasion and money laundering. Thus, these factors are particularly harmful characteristics of a tax haven and...of a harmful tax preferential treatment."*[216]

The OECD further explained the *principle of disclosure* in the following manner;

> *"The ability or willingness of a country to provide information to other countries is a key factor in deciding upon whether the effect of a regime operated by that country has the potential to cause harmful effects. A country may be constrained in exchanging information, for the purpose of the application of a tax treaty as well as for the application of national legislation, because of secrecy laws which prevent the tax authorities from obtaining information for other countries on taxpayers benefiting from the operation of a preferential tax regime. In addition, even where there are no formal secrecy laws, administrative practices may impede the exchange of information. For example, the country may determine as a matter of administrative policy that certain transactions or relations between an enterprise and its customers are a business secret which need not be disclosed under Article 26 paragraph 2(c) of the OECD Model Tax Convention, or the country with the preferential tax regime may simply be uncooperative with other countries in providing information. Such laws, administrative policies, practices or lack of co-operation may suggest that the preferential tax regime constitutes harmful tax competition."*[217]

On the basis of the aforesaid, two salient issues concerning the *theory of international co-operation* are highlighted. Firstly, there should be procedures in place to identify the beneficial ownership of every commercial entity that is registered in SVG. In the absence of such procedures, the fiscal regime of SVG will be considered to be harmful. Secondly, any constraints (whether legal or otherwise) on the provision of information, will also be considered harmful. Therefore, the *principle of disclosure* and the *principle of transparency* must be effectively applied to the regulatory and supervisory framework of SVG in order for it to escape being labelled as an 'uncooperative tax haven.' The mere fact that SVG was labelled as such raises the presumption that its legal and administrative practices were not conducive to the effective exchange of information

[216] OECD Report, "Harmful Tax Competition an Emerging Global Issue" 1998, pp. 23-24 para 53.
[217] Ibid at p. 30 para. 64

and that they lacked transparency. Even if that were the case it is nonetheless herein contended that SVG did not violate any international legal principles to justify the categorisation attributed to it by the OECD.

To the extent that the OECD contended that the regulatory regime of the OFSS did not provide for the effective exchange of tax information about the identities of the beneficial owners of offshore entities in SVG that contention was not without merit. That does not however imply that there were no procedures and practices in existence and thus, the OFSS was not transparent. Issues relating to exchange of information and transparency will be more appropriately and extensively discussed in chapter 4. However, a brief overview of issues relating to the exchange of information will nonetheless, be provided at this stage.

The offshore finance laws restricted the disclosure of information relating to tax and revenue matters[218] and also in some instances information about investors, whether or not the matter related to tax,[219] except that in situations of criminal conduct[220] the disclosure of information was permitted (for a more extensive analysis see chapter 4.14). In SVG the laws that govern the OFSS are different to those that govern the domestic financial services sector. In the domestic sector the restriction on the disclosure of information is not as stringent as those in the OFSS. Nevertheless, it can be strongly argued that in criminal matters, the OFSS and the domestic financial services sectors are governed by the same law, namely, the Mutual Assistance in Criminal Matters (MACM) Act 1993 (see further chapter 2.7 and 2.14). Section 37 of that Act provides that:

> *"The provisions of this Act shall take effect notwithstanding any provision of any other Act to the contrary, to the extent that any such provision of any other Act shall be deemed to have been hereby amended to the extent required to ensure compliance with the relevant provisions of this Act."*

[218] Section 3(3)(b)(iii) of the Confidential Relationships Preservation (International Finance) Act 1996 which provides that; *"This Act has no application to the seeking divulging or obtaining of confidential information...by or to...the Offshore Finance Inspector or a State police officer of the rank of Inspector or above, specifically authorised by the Minister in that connection, investigating an offence against the criminal laws of another State, other than an offence under that other State's tax or revenue laws. committed or alleged to have committed outside the State, which offence, if it had been committed in the State would have been an offence against its criminal laws, so long as the confidential information sought , obtained or divulged is directly relevant to the investigation of that offence."*

[219] Sections 13(3) and (4) and 22 of the International Banks Act 1996; Section 64 of the International Trust Act 1996; Section 42 of the International Insurance Act 1998; Section 38 of the Mutual Funds Act 1998

[220] Section 3(3)(b) of the Confidential Relationships Preservation (International Finance) Act 1996

That section appears to elevate the MACM Act above any other legislation, whether offshore or domestic, that relates to the disclosure of information in criminal matters. Accordingly, OECD countries which are also members of the Commonwealth may submit request to and should receive from SVG, information relating to a criminal investigation, provided that the conditions for the provision of information are satisfied (see chapter 2.7 for further discussion). Although the MACM Act 1993 is primarily concerned with the provision of mutual assistance in criminal matters within the Commonwealth, it can nonetheless be extended to include other countries in the scheme to give effect to treaty arrangements in criminal matters. Such an extension can easily be made by way of Regulations.[221]

It is however important to note that the restriction that was imposed by Section 3(3)(b)(iii) is not without legal justification. It essentially puts into statute a long standing common law principle which states that, *'no country ever takes notice of the revenue laws of another.'*[222] This is still good law today, although public policy may demand that the foreign laws be recognized, especially where there is a transaction relating to a tax evasion scheme (see chapter 4.14). It is not however the duty of SVG to be the tax policeman of any country.[223] In this regard Lord Denning expressly indicated that the Court does, *"... not sit to collect taxes for another country or to inflict punishments for it."*[224] Accordingly, the courts have been requested to bear in mind that, *"In every case the substance of a claim must be scrutinized and, if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected."*[225] On the basis of the foregoing the law is clearly on the side of SVG and supports the privacy and confidentiality of tax information required by the OECD.

The OFSS, as was mentioned above, is predicated on two fundamental factors, namely, confidentiality and asset protection. The maximisation of returns as a result of the minimisation of taxes also holds great significance. If information about tax payers is disclosed to the tax authorities in the country in which they reside, then the whole notion of offshore investment would be severely undermined. Moreover, this would have serious implications for an individual's right to privacy. There is indeed an

[221] Section 30 of the Mutual Assistance in Criminal Matters Act 1993.
[222] Holman v Johnson (1775) 1 Cowp 314 at p. 343
[223] Mitchell J., "A Season of Light-A series of Messages on Development in St. Vincent and the Grenadines," Concept Publishing Inc. 2001 at p. 62
[224] A-G(New Zealand) v Ortiz [1984] AC 1 at p 20
[225] Peter Buchanan Ltd and Macharg v Mc Vey [1955] AC 155 at 529

argument for the restriction of an individual's right to privacy whenever the infringement of that right is necessary for law enforcement officials to conduct a criminal investigation and procure a conviction. But the OECD does not only require the disclosure of criminal tax information, it also seeks the disclosure of tax information that relates to civil matters as well.[226] This is clearly borne out in the 1998 Report wherein the distinction between tax evasion and tax avoidance becomes blurred.

1.4.2.2.1 Tax evasion and Tax avoidance

Whereas tax evasion is illegal,[227] tax avoidance is not[228] and that distinction should be maintained. In **Duke of Westminster v IRC**,[229] Lord Tomlin stated that:

> *"Every man is entitled if he can to order his affairs so that the tax attaching under appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."*[230]

If the view is also taken that no one should be penalised for a conduct that is not forbidden by law[231] then investors possess the right and freedom to invest wherever they so desire. The avoidance of tax by investing in an OFC is not therefore illegal, although it may be seen by the OECD as immoral. But then immorality in tax matters should not be the basis on which the OECD threatens to impose countermeasures on OFCs for engaging in what it terms as harmful tax competition. On the basis that SVG, as stated above, has adopted the English common law system its tax regime will not base the payment of taxes on issues of morality. In **Ayrshire Pullman Motor Service v IRC**,[232] Lord Clyde stated that:

> *"No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property so as to enable the revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow- and quite rightly- to take every advantage which is open to it under the taxing statutes for the*

[226] OECD Report, "Harmful Tax Competition an Emerging Global Issue" 1998, p. 10 para 12 in which the initiative concerned both tax evasion and tax avoidance.
[227] Fitzwilliam v IRC [1993] STC 490 at 520. *"Tax evasion now carries with it overtones of improper conduct such as supplying false or misleading information to the inland revenue or submitting false or misleading documents such as the provision of invoices charging fees for services or goods which are not supplied."*
[228] Lord Templeman, "Tackling Tax Avoidance" in Shipwright A, "Tax Avoidance And The Law- Sham, Fraud or Mitigation?" 1997, p. 1, *"Tax avoidance reduces the incidence of tax borne by an individual tax payer contrary to the intentions of Parliament but does not involve concealment and is not unlawful."*
[229] (1935) 19 TC 490
[230] Ibid at p. 520
[231] Dicey A., "The Law of the Constitution" 10th edn 1960 202: *"A man may be punished for a breach of law, but he can be punished for nothing else."*
[232] (1929) 14 TC 754

> *purpose of depleting the taxpayer's pockets. And the tax payer is, in like manner, entitled to be astute to prevent, so far as he honestly can the depletion of his mean by the Revenue."*[233]

Lord Templeman has also expressed his disagreement for any tax which is based on issues of morality when he stated that, *"there is no morality in a tax and no illegality or immorality in a tax avoidance scheme."*[234] Therefore, it is difficult to see how the OECD can consider itself justified in requesting the disclosure of information about someone who has not committed a crime by arranging his affairs to minimise tax and by doing so in SVG. Lord Upjohn has also recognised the need to maintain an individual's right to organise his affairs in order to minimise the amount of taxes that he pays. In this regard he stated that;

> *"My Lords, I would only conclude my judgment by saying, when a question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out-one by paying the maximum amount of tax, the other by paying no, much less, tax- it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved."*[235]

If investment in offshore structures in SVG provides such a way, then it seems unreasonable to hold that SVG is engaging in harmful tax competition. Many of the OECD countries have themselves encouraged tax avoidance by introducing tax incentive schemes[236] into their legislation and inadvertently or by design left loopholes that persons have exploited to their advantage. For States to blame the OFCs for the ingenuity of their taxpayers without having considered significantly the structure of their own fiscal policies raises questions concerning the real reasons for the tax initiative. Another rather interesting development with the *principle of disclosure* is that it requires from jurisdictions in which income tax is exempt the effective exchange of information on tax payers. But how could there be any effective exchange of information when the jurisdiction in which there was complete exemption from income tax would not have any need to request information on criminal or civil tax matters?

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233 Ibid at pp. 763-764

234 Ensign Tankers(Leasing) Ltd v Stokes [1992] 1 AC 655 or [1992] 2 ALL ER 275

235 IRC v Brebner (1967) 43 TC at p. 705 at p 718H

236 see tax incentives offered by England for non-domicilliaries Section IV – Clarke G, "Offshore Tax Planning," Tolley Lexis Nexis 9th edn 2002 discussion in chapters 3, 5 and 6

Moreover, that jurisdiction understandably may not have any need to criminalise tax evasion[237] since there is no tax to evade. In SVG where the offshore finance sector is exempt from income tax, should there be any effective exchange of information on persons who are investing in that sector? If they cannot be charged in SVG with tax evasion for non-payment of income tax as a result of their commercial activities in the offshore finance sector, why then should information relating to tax and revenue matters be disclosed to the countries in which the tax payers reside? The offshore legislation seemed to have solved this matter and many other questions by prohibiting altogether any disclosure that related to tax and revenue matters.

1.4.2.3 No or substantial activities

The OECD contended that: *"Many harmful preferential tax regimes are designed in a way that allow taxpayers to derive benefits from the regime while engaging in operations that are purely tax driven and involve no substantial activities."*[238] In so far as the OFSS sector in SVG is concerned it will be argued that such a contention does not have any relevance. It was mentioned earlier that one of the main purposes of the reform of the OFSS was to facilitate the creation of jobs for the unemployed. This is reflected in certain provisions of the offshore legislation and also has been an administrative practice of the Offshore Finance Authority (OFA). For example, under Section 4(2) of the International Banks Act (IBA) 1996[239] the OFA was permitted to issue international banking licenses subject to certain conditions. One of the conditions which was consistently imposed with the issuance of an international banking license, was that the licensee was required to employ a minimum of two persons in its banking operations in SVG. In that way no 'name plate' or 'shell' banks[240] were legally permitted in SVG.

Moreover, Section 18(1)(g) of the IBA 1996 imposed on any international bank which did not accord with that condition, certain penalties, including the revocation of its

[237] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance" World Development Vol. 30, No.9 pp. 1657-1673, 2002 at p. 1662 *"Switzerland, for example, still does not recognise tax evasion as a crime and refuses to remove statutory obstacles posed by banking secrecy provisions in cases of legitimate enquiries by tax authorities. Despite claiming to have State of the art anti-money laundering legislation Swiss money laundering investigations concentrated at cantonal level, and suffer from a lack of cooperation between cantons. Successful prosecution are few and far between, and Geneva prosecutors have yet to achieve a successful prosecution in a variety of cases involving Russian-related money laundering."*
[238] OECD Report, "Harmful Tax Competition an Emerging Global Issue" 1998, p. 34 para 79.
[239] See www.stvincentoffshore.com for the International Banks Act 1996 and its amendments.
[240] Those are banks that do not conduct any operations in the jurisdiction where they are registered.

licence.[241] The International Business Companies (IBC) Act 1996 also encouraged any IBC to establish its operations in SVG by providing that its administrative functions, though local, will not in anyway adversely affect its status as a company that is exempt from income tax.[242] Similarly, Sections 25 and 26 of the IBC Act 1996 impose on every IBC the obligation of establishing its Registered Office in SVG and maintaining a Registered Agent therein as well. There are provisions in other offshore legislation that also require that some form of commercial activity must be located in SVG.

The nature of the offshore industry is such that an offshore entity may be registered in one jurisdiction but the commercial activity may be conducted elsewhere. What SVG anticipates is that its Registered Agents and other service providers are given the opportunity to manage the affairs of offshore businesses in SVG. For example, an IBC or mutual fund that is registered in SVG may have invested in the USA but the management of those activities may be located in SVG. The provisions of the Registered Agent and Trustee Licensing Act (RTLA)1996, together with the Mutual Funds Act (MFA) 1998 and the International Insurance Act (IIA)1998 (see chapter 4) are crafted in a manner that makes it mandatory for certain offshore entities to engage in commercial activities in SVG.

Interestingly, the criteria 'no substantial activity' is problematic in that it does not provide any guidelines regarding what is or is not substantial. What may not be substantial for the economy of a developed country may well be substantial for a small developing country like SVG. In the OECD Report of 2000 some clarity was introduced. The 'no substantial activity' criterion was made to relate to a jurisdiction that *"...facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the economy."*[243] Although it is now clearer as to the legislative circumstances under which a jurisdiction is said to fall within the 'no substantial activity' criterion, the uncertainty as to what is or is not factually substantial still remains. Nevertheless, SVG's offshore policy perspectives together with its offshore legislation clearly encouraged as opposed to prohibiting substantial activity in its jurisdiction. For that reason it is contended that SVG should not be considered as falling within the 'no substantial activity' criterion.

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[241] Section 18(2) of the International Banks Act 1996
[242] Section 5(2)
[243] OECD Report, "Towards Global Tax Co-operation" 2000 at p. 10 note 4

1.5 The Unfairness of the harmful tax initiative

Switzerland and Luxembourg opposed the OECD tax initiative but were not placed on the list of 35 countries[244] that were blacklisted by the OECD and neither were they amongst the 20 countries on the blacklist by the February, 2002 deadline. Switzerland refuses to recognize tax evasion as a crime and still maintains obstacles through its banking secrecy legislation in the way of those wishing to obtain the disclosure of tax information.[245] As Hay has observed:

> *"The OECD appears to take the position that this dissenting view is de minimis, as 27 other countries approved the Report. However, this overlooks the fact that the non-cooperating OECD states are the principal onshore competitors for the offshore world, and account for many of the tax neutral structures run onshore within the OECD...Offshore centres are concerned that if Switzerland (and Luxembourg) are not obliged to adhere to the standard sought to be imposed on offshore centres, business will migrate from offshore centres to OECD member countries. If Switzerland's commitment is delayed so that it remains the 'last man standing' for client's seeking financial privacy, client structures may well come to rest there, even if Swiss laws subsequently change."*[246]

The OFCs argued that the OECD by instructing them to restructure their fiscal policies to accord with the requirements of the harmful tax initiatives was impinging on their sovereignty (see chapter 6.2). They argued that they as independent territories (States) must be left to manage their affairs with minimum or in some instances no interference from other countries. Although this argument was strong enough to garner international support, it did not gather sufficient strength to hold back the strong tide of the tax initiative. Much support came from Mr Paul O'Neill when he stated that:

> *"I share many of the serious concerns that have been expressed recently about the direction of the OECD initiative. I am troubled by the underlying premise that low tax rates are somehow suspect and by the notion any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I am also concerned about the potentially unfair treatment of some non-OECD countries. The USA does not support efforts to dictate to any country what its own tax rates or system should be, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments-like businesses-to create efficiencies..."*[247]

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[244] Antigua, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Kitts and Nevis, St. Lucia, St.Vincent and the Grenadines, Tonga, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

[245] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance." World Development vol. 30, No. 9, pp. 1657-1673, 2002 at p 1662

[246] Hay R., "Information Exchange and The Offshore Finance Centres Part 1" Private Client Business, 2002, 2, 88-97 at p. 95

[247] Ibid pp137-138: Mr.Paul O'Neill in his capacity as US Treasury Secretary, made this statement on 10th May, 2001

Due to fear of reprisals from the OECD countries in the form of economic countermeasures many of the OFCs relented and signed letters of commitment with the OECD to exchange tax information between 2004 and 2006.[248] This required the modification of the offshore legislation in those OFCs that gave the commitment and a significant dilution in the strength and potency of banking secrecy, privacy and confidentiality. But as Hay[249] acknowledges a level playing field does not exist and cannot exist where OFCs are asked to adhere to rules that are not universally accepted by the OECD members. In this regard, he stated that as a result of the OECD's Report which was tabled on June 26, 60 harmful tax preference regimes existed in its member territories. Another published Report[250] revealed that there are about 200 preferential tax regimes in member territories and 85 such regimes in dependent or associated territories. There were no threats or countermeasures against those member territories who do not remove those harmful tax preferences by April 2006. Furthermore, Hay also acknowledges that the OECD is overlooking the dissenting voices of Switzerland and Luxembourg on the bases that they are a minority and continues to ignore the fact that those countries are strongly competing with the OFCs.[251] Those two countries account for the vast majority of the tax neutral structures conducted onshore in the OECD. It is reported that in 1996 Luxembourg accounted for more than half the world's offshore mutual funds.[252]

Neocleous questioned the double standards of the OECD by suggesting that the export tax breaks and subsidies that they gave to extremely large corporations are just as harmful as low direct taxes and special treatment of international business companies. He further gave examples of the WTO ruling on the substantially large tax breaks that were given to companies like General Electric, Boeing and Microsoft and which were later ruled as illegal by the WTO in January 2002.[253] The uneven playing field that

[248] Bermuda, Cayman Islands, Cyprus, Malta, Mauritius, San Marino, Isle of Man, Netherland Antilles, Seychelles, Aruba and St. Vincent and the Grenadines to name a few: See Hay R., "Information Exchange and The Offshore Finance Centres Part 1" Private Client Business, 2002, 2, 88-97 at p. 97
[249] Hay R, "OFCs: The Supranational Initiatives" -Private Client Business 2001,2, 75-91
[250] Primarolo Report drafted in a parallel E.U initiative published on February 28, 2002.
[251] Hay R., "Information Exchange and The Offshore Finance Centres Part 1" Private Client Business, 2002, 2, 88-97 at p. 95
[252] Neocleus E, "Off-shore Financial Centres-Recent Developments"- J.I.B.L 2002, 17(5), 136-139 at p 137
[253] Ibid at p. 139

exists and projects the OECD's harmful tax initiative as lacking credibility was emphasised by Hay who stated that:

> *"Some countries within the OECD membership have had great difficulty in ensuring that local and state governments observe the commitments adopted by the national government. The United States, for example, perceives constitutional constraints in supervising state governments. Thus, at the same time as the United States federal government was threatening sanctions against foreign jurisdictions reluctant to compromise banking privacy, Montana and Colorado passed laws creating 'foreign capital depositories' designed as confidential accounts and described as "the first Swiss style private banking in the U.S.A.' Advertising for the facilities based in Colorado included representations that foreign civil and tax judgments against depositors would not be enforceable in the United States."*[254]

He further emphasised that;

> *"Similarly concerns arise from the opportunity to establish United States limited liability corporations in Delaware (and most other United States) with no disclosure of beneficial ownership. The OECD is threatening sanctions against offshore centres which do not agree to record and exchange information on beneficial ownership, yet the United States state governments would plainly be unable to provide similar information in respect of tax-free limited liability corporations ('LLC's') established in the United States."*[255]

It is against this background that a brief overview of the taxation issues that are germane to this thesis is provided. A more extensive analysis will be provided in chapter 5 when the international initiatives to combat money laundering will be discussed.

The OECD argued that OFCs by their fiscal policies were eroding the tax basis of OECD countries. It did not however present any empirical data to support such a hypothesis. But it is contended that the freedom of movement of capital is an inevitable consequence of globalisation.[256] As Fitzgerald observed; *"international capital flows are a central characteristic of the global economy of which developing countries increasingly form a part."*[257] Essentially, in a world with such liberal trading arrangements it is anticipated that capital would move towards the economic sectors with the greatest advantages to the investor, be they tax, privacy or rate of return. In any event, investments made in OFCs are predominantly for the purposes of tax planning and privacy and are usually

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[254] Hay R., "Information Exchange and The Offshore Finance Centres Part I" Private Client Business, 2002, 2, 88-97 at p. 96

[255] Hay R., "Information Exchange and The Offshore Finance Centres Part I" Private Client Business, 2002, 2, 88-97 at p. 96

[256] Stern B., "How to Regulate Globalisation," in Byers M., "The Role of Law in international Politics," Oxford 2003, at p. 248

[257] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law" 2000 at p. 197

made with funds that were generated from economic and commercial activities which took place in OECD countries. Offshore Tax planning involves "... *arranging one's affairs to take advantage of the obvious and often intended effects of tax rules in order to maximise one's after- tax returns.*"[258] For the most part those funds would have already suffered either indirect or direct taxes before the investment is made. To require information about persons that would restrict the lawful usage of their monies and dictate where and how it should be spent and invested, clearly interferes with those persons' privacy and freedom of choice.[259]

The right to privacy, or as it is otherwise called, the right to private life is a fundamental right that should be preserved within certain acceptable limits. Thus information should be disclosed in circumstances where a fraud or a crime has been committed. Further discussion of this issue will be made in chapters 4.14 and 6.8. However, it is instructive to note that the UN Declaration of Human Rights 1948 recognises this right and protects privacy as a basic right human right. Article 12 provides that:

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against interference and attacks."*

Even if it is accepted by the OECD that offshore tax planning is desirable there is still the uneasy intrusion of the requirement to disclose information about their residents who are investing in OFCs. Many of the OFCs have either amended their laws to facilitate such a disclosure or have given the commitment to do so by 2004 for criminal tax information and by 2006 for civil tax information. The OECD has threatened to impose countermeasures if such commitments were not given. This approach by the OECD raises several issues relating to the right to private life, sovereignty and private international law issues concerning the recognition, enforcement and exclusion of foreign revenue laws. On the issue of right to private life it was stated that, "*The complete record of an individual's financial transactions now sought on a global basis forms a revealing insight into intimate details of one's personal life. The collection and sharing of such information and the usage of databases through the use of electronic tools, poses many questions for the privacy of individuals.*"[260] Whereas in some cases (e.g. tax evasion) it may

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[258] James S., & Nobes C., "The Economics of Taxation-Principles, Policies and Practice," Prentice Hall 7th edn, 2002/2003 at p. 16: See also Clarke G, "Tolleys Offshore Tax Planning" 9th edn 2002 Tolleys p 5 para 1; although the UK is used as the country whose tax the investor is trying to avoid this does not mean the same definition will hold true for other jurisdictions like the UK.

[259] See chapter 6

[260] Hay R, "OFCs- The Supranatural Initiatives," 2001 Private Client Business 2001, 2, 75-91 p 78

be desirable to disclose tax information, there are also problems associated with the fear of that information falling into the wrong hands. For example, in 1998 the United Nations Office for Drug Control and Crime Prevention (UNDCCP) published a Report which indicated that in the former Soviet Union *"criminal gangs bought banks in order to determine who had bank accounts large enough to make kidnappings worthwhile."*[261]

With regard to issues of sovereignty (see chapter 6) the OECD has in the past been confronted by its members in its attempt to negotiate a Multilateral Agreement on Investment (MAI). The majority of European countries and the developing countries considered the MAI to be encroaching on their territorial sovereignty.[262] In that regard Stern observed that:

> *"States should be able to set their own hierarchy of values and not be forced to tolerate the outcomes of liberalisation without question. Finally, in November 1998 the negotiations were stopped, and the MAI is for the time being dead."*[263]

On the basis that the MAI was not accepted due to issues of sovereignty, it seemed rather strange that some of those countries in the OECD who opposed the MAI were actually supporting the OECD's harmful tax initiative.

1.6 Conclusion

Hampton and Christensen although recognizing the many profound economic disadvantages of SIE OFCs and the reasons for their emphasis on offshore financial services stated as follows:

> *"Perhaps not surprisingly, many SIE governments have gone to great lengths to encourage the growth of offshore finance activity, often without considering the adverse impacts that such booming growth might impose upon the pre-existing industries.. It is reasonable to ask, why so many SIE governments allowed themselves to become overly dependent upon an activity that common sense suggests would sooner or later become the focus of international intervention. Was it merely a failure of prudential risk management on their parts, or were other forces at play that prevented them from managing their dependency upon economic factors? In other words how did tax havens and OFC host governments lose control of their destinies?"*[264]

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[261] United Nations Office for Drug Control Crime and Prevention (UNODCCP): Financial Havens, Bank Secrecy, Money Laundering double issue 34 and 35 of the Crime Prevention and Criminal Justice Newsletter and Issue 8 of the UNDCP Technical services, 1998 at p. 68

[262] Stern B., "How to Regulate Globalisation," in Byers M., "The Role of Law in international Politics," Oxford 2003, at p. 249 : See also Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law" 2000 at p. 197

[263] Ibid

[264] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance." World Development vol. 30, No. 9, pp. 1657-1673, 2002 at p 1663

The response to those questions is that SIE OFCs by virtue of their sizes and economic differences had to find a niche market. One in which they are able to compete effectively on the international market given the WTO's rulings on free trade and the removal of barriers to free trade. These OFCs had to "piggy back" off developed countries in order to conquer the disadvantages that accompany their small sizes and scales. Baldacchino in reference to arguments on the development of small states responded that, " *successful economies were those who were able to manipulate the larger countries (or regional blocs) to create a local advantage for themselves. Pursuing this theme, ... this exemplified an opportunist, pragmatism with microstate governments seizing passing opportunities in a similar manner to which islanders have historically been pirates and privateers in many parts of the world.* "[265]

Whereas to a large extent SIE OFCs have been managing their economies off the dependency on countries with large economies, it is totally untrue, unreasonable, inconsiderate and unfair to compare that conduct with those of pirates and privateers. Such a comparison connotes illegality or illegitimacy on the part of OFCs due to their involvement in offshore financial services. SIE OFCs for the most part are established to encourage clean and hard earned monies to be invested within their shores in the same way that encouragement is given to investors by developed countries to participate in the available investment opportunities. The major difference apart from size is the fact that the developed countries can use both the monetary and fiscal macroeconomic tools to stimulate or contract investment. SIE OFCs due to their relatively inactive financial markets are left with the fiscal tool to manage their economies. What is the difference between advertising the sale of microchips, motor cars, arms and ammunitions, aeroplanes and advertising offshore financial services? Both encourage persons from all over the world to participate in the activities either by buying the product or paying for the services. They also encourage the movement of capital from one place to another, a concept currently advocated by the OECD as capital flight.

Support for the establishment of OFCs was given by Park who argued that by internationalizing the financial services provided by these OFCs, foreign direct investment will be attracted and so will specialist knowledge and experience in the provision of financial services. Once these spill offs are achieved they will provide great

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[265] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance." World Development vol. 30, No. 9, pp. 1657-1673, 2002 at p 1663

assistance to helping the local industry to become internationally competitive.[266] It is perfectly reasonable and legitimate for OFCs to participate in the provision of offshore financial services. The developed countries have been providing those services for years and have been successful at it. Some of the factors that were responsible for the emergence of the OFSS through euro-currency and private banking still exist today. As sovereign nations many of these SIE OFCs have engaged in offshore financial services which are perfectly legal. Furthermore, it raises the question as to why should the USA attempt to permit such financial services on its shores (e.g. Delaware) yet it sees the services provided by SIE OFCs as undesirable? Euro-currency banking is still very much a part of every day life in the financial centres of Europe, especially London and private banking is the hallmark of financial services in Switzerland.

It was not failure of prudential risk management or the loss of control by the government of OFCs that brought on the pressures that they now experience. It was the external forces at play that are significantly influencing the way their economies are managed. Those forces, (apart from globalisation and the WTO, which are concepts and processes designed to impact positively on world trade) are the complaints by the OECD of capital flight and by the FATF concerning their alleged contribution to the money laundering process. Surely the FATF and OECD countries are aware that the development of the euro-currency and private banking sectors were as a result of capital flight from one country to another? The development of those sectors came about because of increased benefits to be derived from transacting outside a regulatory and supervisory framework. The conduct of business activity in that way created the circulatory system through which the proceeds of crime flowed with impunity.

Research has shown the extent to which capital flight was prevalent in the euro-currency banking system and the significant sums of money that were laundered every year in the OECD/FATF countries. Although it has been reported that over $6 trillion in assets were placed in OFCs,[267] those assets were eventually invested in the international financial markets to provide a source of capital for the expansion of economic activities in the OECD/FATF countries. The multiplier effect of such investment was

[266] Park Y, "The economies of Offshore Finance Centres"- Columbia Journal of World Business (1982) 31-35; see also Hampton M & Christensen John, "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance." World Development vol. 30, No. 9, pp. 1657-1673, 2002 at p 1663

[267] Neocleous E., "Offshore Financial Centres-Recent Developments" J.B.I.L. 2002, 17(5). 136-139 at p. 136

phenomenal. Those funds would have been used to create employment, pay both direct and indirect taxes, improve and expand capital through the process of construction and improvement to capital assets.

If it is accepted that there was significant capital flight from OECD member countries to OFCs, such flight it is contended was only transient and may not have had a devastating effect on the tax bases of OECD member countries. What was significant may be the loss in tax revenues that may otherwise have been collected had the funds not been sent offshore in the first place. But the net effect of any alleged loss in tax revenues should be the benchmark by which the impact of capital flight on the economies of OECD/FATF countries should be measured. It is therefore suggested that empirical data in that regard is necessary before any convincing argument about capital flight should be entertained. It is also reasonable to state that the administration of those assets that form the basis of the capital flight may take place in SIE OFCs, from which revenues are earned by the OFCs. However, the vast majority of the benefits of those funds remain in the developed countries through repatriation of income and/or investment in capital.

There is no denying that the problem of money laundering must however be given greater attention. What however is unfair and unreasonable is the suggestion that the SIE OFCs because of inadequate supervisory and regulatory framework are mainly responsible for creating the environment for money laundering to flourish. It is not advisable to assess the problem of money laundering solely on the basis of inadequate financial controls, since to do so will be ignoring the problem altogether. In many of the OECD/FATF countries money laundering is rife. Even in the USA where there are extensive regulatory controls, it was noted earlier in this chapter that money laundering is still very high. Whilst SIE OFCs swiftly introduced and amended their anti-money laundering legislation in response to the FATF/OECD's initiatives, other countries including Switzerland and Austria still maintained banking secrecy provisions in their financial services legislation. Despite its bold claims to have state of the art anti-money laundering legislation the prosecutors in Switzerland have failed to secure convictions amidst the multitude of cases, especially concerning Russian related money laundering cases.[268] It is therefore rather strange that the FATF did not conduct any evaluation of

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[268] Hampton M & Christensen J., "Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance" World Development Vol. 30, No.9 pp. 1657-1673, 2002 at p. 1662

Switzerland or Luxembourg. As a matter of fact at the time of the blacklisting of SVG no evaluation had been conducted on any FATF member territory, although the United Nations UN Office for Drug Control and Crime Prevention in their report on *Financial Havens, Banking Secrecy and Money Laundering* mentioned Switzerland, Luxembourg and other European jurisdictions as secrecy havens.[269]

This is not to say that the poor and inadequate regulations of certain OFCs should be allowed to subsist. Every effort should be made to improve them and significantly mitigate any opportunity that can be easily exploited by the launderer. Blacklisting those OFCs in the way it was done was not the answer. There were many OECD/FATF countries that should have been on the blacklist, because of the extent of money laundering activities that research data have shown were occurring in those countries. Their absence substantially weakened the FATF's initiative and cast suspicion on its motives. Accordingly, the mere fact that many countries, in fear of reprisals, actually introduced legislation that favoured the money laundering initiative did not necessarily mean that they would be effectively implemented.

There has got to be a two pronged approach to the FATF's initiative. The first approach has to do with the eradication of the organized criminal activities from which the proceeds of crime originate. These activities in the main were concentrated in OECD/FATF countries and will form a substantial part of the discussion in the following chapter. Suffice it to say however, that this is where the emphasis should be placed and should not be used as an excuse for placing the emphasis on the proceeds of crime. The major markets for all organized criminal activities exist in developed economies. Those economies provided the markets for drugs, trading in illegal weapons, trading in people, fraud and other types of serious crime(see chapter 2). Those activities must be significantly alleviated and must not be ignored.

The second approach is the eradication of money laundering activities. These two approaches on first appearance may seem tantamount to a 'chicken and egg' situation but they are not. The first can exist in isolation of the second but the second cannot exist in isolation of the first. Although both approaches are of concern to SIE OFCs, especially in relation to drugs the one that requires most attention is money laundering

[269] United Nations Office for Drug Control and Crime Prevention, "Financial Havens, Banking Secrecy and Money Laundering," (1998) at p 29.

where the financial opportunities available in SIE OFCs can facilitate the money laundering process. Although there is a need for improvement in the regulatory and supervisory framework of some SIE OFCs, such an improvement could have been achieved without imposing unnecessary pressures on them. Such pressures can be compared to the maxim, 'taking a sledge hammer to crack a nut.' If the SIE OFSS are pressurized in this way they will undoubtedly be dismantled but there will still be no guarantee of the abatement of money laundering activities world wide.

Having given an overview of the historical perspectives of OFCs and the justification for their continuance, the stage has now been set for similar perspectives to be given of money laundering and its evils to society. In that regard, the following chapter will discuss money laundering and the role that was played by governments and agencies of governments of developed countries in perpetrating the money laundering process. Chapter three will however place emphasis on the money laundering and offshore laws of St. Vincent and the Grenadines in an effort to show whether they adequately satisfied the requirements of the FATF.

Chapter 2. "Money Laundering, Drug Trafficking, Organised Crime and The FATF Member States"

2.0 Introduction

Over the past ten years or so money laundering has created tremendous difficulties for local, regional and international law enforcement agencies. The problem of money laundering is great. As Peter Lilley pointed out:

> *"Money laundering is the dynamic that enables criminal activity of all descriptions to grow and expand. This process-the delivery channel of cleaned funds- is now embedded in the normal business environment that we may well have little chance to control it."*[1]

In the previous chapter it was mentioned that in order to effectively control money laundering all jurisdictions, no matter how small or how large, rich or poor, must cooperate and give their fullest support to combating money laundering. There must not be one rule for certain countries and another for other countries. Similarly, in apportioning responsibility, equity and good reason must prevail.

This chapter, as in the previous chapter and as will be demonstrated in the subsequent chapters, will show that in the apportionment of blame, OFCs have been receiving more than their fair share. Although it is accepted that some OFCs have facilitated the money laundering process, all have been condemned by the FATF and other exponents of the anti-money laundering initiatives. What was most remarkable however was that several of the FATF member States were infested with the scourge of money laundering and the underlying criminal activities from which the proceeds of crime were derived. In some instances they were not only facilitating or condoning money laundering but were actually perpetrating it as well. In this chapter, it will be contended that FATF member States were the hosts for the nefarious activities that gave rise to money laundering and that the initial stage of the money laundering process began within those States and then the proceeds were distributed to other jurisdictions, including OFCs. Yet not one of the FATF member States was blacklisted with SVG in June 2000.

In support of that contention a brief overview will be given about the origins of money laundering and the money laundering process. Thereafter, emphasis will be placed on the involvement of certain FATF countries in the money laundering process and the criminal activities that generate the proceeds of crime. In essence, this chapter highlights the need for further action in the FATF States to control the criminal conduct from which substantial proceeds of crime have accrued. Although it is accepted that

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[1] Lilley P., – "Dirty Dealing, The Untold Truth About Global Money Laundering," 2000 at p. 2

there needs to be gallant efforts in the fight against money laundering, it is nonetheless contended that money laundering is a part of a process which mainly began and ended in the FATF States. Therefore, the need for a much greater effort by FATF States to control the criminal activities that were carried on within their borders cannot be ignored and should be given greater attention than that which was given to the anti-money laundering initiative.

2.1 Origins of the term Money Laundering

Money laundering as it is known today is a term that originated in the United States of America during the 1920s[2] to describe the methods used by criminals to conceal or disguise the proceeds of criminal activities but it has since gained popular usage, especially after the Watergate Inquiry in the USA in the mid- 1970s.[3] However, it was not until around 1982 in the case **US v $US 4, 255,625.39**[4] that it gained legal recognition. Thereafter, it has been used by all and sundry as an acceptable description for transactions concerning the proceeds of crime. In effect, it has now become a term of law.

2.2 What is money?

The term money originated from the Latin word *moneta* where the first Roman coin was minted at the temple of Juno Moneta in 344BC.[5] In the money laundering context, money represents the proceeds of ill-gotten gains and this may take the form of cash, gold, silver, a house, an aeroplane, a yacht, a financial instrument or any other item that is accepted as money. It is therefore important to understand the meaning of money in order to appreciate the complex and sophisticated methods that are employed in the laundering process. Money has been defined in the following terms:

> *"Anything which is generally acceptable in purchasing goods or settling debts can be said to be money. It need not consist of coins and notes. Oxen, salt, amber, woodpecker scalps, and cotton cloth have at times all been used as money. In fact, the precise substance, its size and shape, are largely a matter of convenience and*

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[2] Ibid at p. 5
[3] Vallance P, "Money Laundering: The Situation in the United Kingdom" Paper presented to the Council of Europe Money Laundering Conference, Strasbourg, France, 18-30 September 1992 at p. 1.
[4] (1982) 551 F Supp. 314.
[5] Beardshaw J – "Economics a student's guide" Financial Tines/Prentice Hall, 3rd edn. 1992 at p. 473

> *custom. But whatever is used, it should be immediately and unquestionably accepted in exchange for goods and services."*[6]

Therefore, if in exchange for the sale of illegal drugs the drug trafficker received any property, for example, a car, a house, expensive jewellery or any other item instead of coins or notes, that which is received is referred to as the proceeds of drug trafficking and is also referred to as money. Understandably, the quantity, quality or level of the proceeds will depend on the value that is attached to those proceeds by the drug trafficker when compared to the value that is placed on the illegal drugs at any particular point in time. Equally, any such benefit that is derived from criminal conduct may also be referred to as the proceeds of crime and any attempts to conceal the provenance or ownership of such proceeds will be tantamount to money laundering.

2.3 What is laundering?

The term laundering on the other hand originated from the legitimate business activities in which criminal elements were engaged. Many of the criminals[7] owned and operated launderettes whose relatively large takings were cash based. These cash takings were frequently deposited at banks which after some time had grown accustomed to accepting cash deposits from those activities and were not usually alarmed by or suspicious of the level or the frequency of the deposits that were made.[8] The criminals then used the takings from the laundering businesses, commingled[9] those takings with the proceeds of their criminal activities and constantly made deposits in order to avoid creating any suspicions about the origins of some of the deposits that were made. In effect, the launderettes were used as front activities in an effort to conceal and disguise the origins of most of the monies that were deposited. In this way, criminals were able to integrate the proceeds of their criminal activities into the financial system to enable them to maintain a luxurious lifestyle, finance future illegal activities and also to invest in legitimate businesses[10] without being easily detected.

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[6] Harvey J – "Intermediate Economics" 4th edn. 1986 at p. 181 : Livesey F –"A Textbook of Economics" 2nd edn. 1985 at p. 176: Lipsey R, "An Introduction to Positive Economics" 6th edn. 1985 at p. 568
[7] Mainly American gangsters operating in the 1920s and during the days of prohibition in the USA.
[8] Morris-Cotterill N., 'How not to be a Money Launderer' Silkscreen Publications 2nd edn. 1999 at p. 3
[9] Lilley P., – "Dirty Dealing, The Untold Truth About Global Money Laundering," 2000 at p. 5.
[10] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 37

2.4 Defining Money Laundering

Having considered the foregoing, it is important to establish a definition of money laundering that will capture the range of activities to which ingenious schemes will be targeted in an effort to put beyond the reach of law enforcement officials the proceeds of ill-gotten gains. Accordingly, an assessment will be made of varying definitions in order to determine that which will more effectively address the problem of money laundering, given societal' perception of the activities that give rise to money laundering and the initiatives currently in place to combat such activities. In that regard, it is instructive to firstly consider the definition of money laundering in the Oxford English Dictionary wherein it is defined as:

> *"transferring funds of dubious or illegal origin, usually from a foreign country and then later to recover them from what seem to be clean sources."*[11]

This definition although it recognizes that the funds in question are not necessarily required to be illegal, has nonetheless created the impression that dubious and illegal funds which originate within the jurisdiction are not likely to fall within the definition of money laundering. This definition is, however, too narrow. Money laundering efforts should be directed against illegal and dubious funds originating from within the jurisdiction as well as those that enter from abroad.

Money laundering has also been defined as; "*...a process by which criminals attempt to conceal the true origin and ownership of their criminal activities. If done successfully, it also allows them to maintain control over these proceeds and ultimately to provide a legitimate cover for their source of income.*"[12] Another definition refers to money laundering as; "*a process of converting or cleansing property, knowing that such property is derived from serious crime, for the purpose of disguising its origin.*"[13]

Whereas the last two definitions cover the reasons for engaging in money laundering activities, the last definition is defective to the extent that it presumes that unless a person knows that the property being laundered is derived from serious crime he cannot

[11] Oxford English Dictionary (eds. Simpson and Weiner)(Clarendon Press, Oxford, 1989), vol. VIII pg. 702

[12] Drage J, "Countering Money Laundering" Bank of England Quarterly Bulletin (Nov 1992) at p. 418

[13] Sherman T, "International Efforts to Combat Money Laundering: The Role of the Financial Action Task Force" in MacQueen, H., "Money Laundering" (Edinburgh University Press, Edinburgh, 1993), p.12 at p. 13

be said to have engaged in money laundering. It therefore fails to recognise that suspicion of the criminal provenance of the property may well suffice for the conduct to be categorised as money laundering. The second definition of money laundering is the most appropriate of all three. It acknowledges that criminals need to distance the provenance and ownership of property as far as possible from themselves in order to give it a legitimate appearance and to retain control of it to be utilised for other purposes.[14] In essence, it is clear from the foregoing definitions that money laundering is a process through which the proceeds of crime are channelled before they are legitimately integrated into the financial system. Accordingly, the FATF refers to money laundering as *"the processing of ...criminal proceeds to disguise their illegal origin"*[15] and suggested that there are three stages in the money laundering process, namely, the *placement stage*, the *layering stage* and the *integration stage*,[16] each of which will be discussed in turn.

2.4.1 The Placement Stage

The *placement stage* is the most important of the money laundering process. It is at this stage that the proceeds of crime initially enter the financial system,[17] either by deposits into deposit taking institutions[18] or the acquisition of an asset.[19] For this reason a tremendous amount of effort needs to be placed into subverting all attempts to introduce illicit gains into the financial system. A simple example of how the proceeds of crime can be placed, layered and integrated into the financial system is as follows.

> *"Cash collected in the USA from street sales of drugs was smuggled across the border to Canada where some was taken to currency exchanges to increase the denomination of the notes and reduce the bulk. Couriers were organised to hand carry the cash by air to London where it was paid into a branch of a financial institution in Jersey...Enquiries in London by HM Customs and Excise reveal that internal bank transfers had been made from the UK to Jersey where fourteen accounts had been opened in company names using local nominee directors. The funds were repatriated to North America with the origin disguised, on occasions in the form of sham loans to*

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[14] UNODCCP, "Financial Havens, Banking Secrecy And Money Laundering," 1998 at p. 4

[15] www1.oecd.org/fatf/MLaundering_en.htm
See also www.unodc.org/unodc/en/money_laundering_cycle.html in which the UNODC defined money laundering as *"the process that disguises illegal profits without compromising the criminals who wish to benefit from the proceeds."*

[16] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 29

[17] Hinterseer K., "Criminal Finance, The political Economy of Money Laundering in a Comparative Legal Context" 2002, at p. 17

[18] Howard C., "Butterworths Money Laundering Law" 2001, at p. 2/1 -2/85
at pp. 2/14 – 2/52 where the following are examined and categorised as deposit taking institutions- Banks, including offshore banks, Credit Unions, Building Societies, Insurances

[19] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 29

> *property companies owned by the principals, either using the Jersey deposits as collateral or transferring it back to North America."*[20]

Another example was given by Blum, Levi Naylor and Williams of cash movements between the USA and Mexico which also involves the usage of bank drafts. They stated that;

> *"Someone might smuggle cash to Mexico, deposit it in a United States dollar account, draw out a draft, mail or carry it into the United States, deposit or cash it in a United States bank – with no requirement under United States law for the bank to report the transaction. Once cashed, the draft returned to Mexico, and the issuing bank wired payment to the cashing bank, often in a bulk payment to cover a number of drafts at the same time, thus further obscuring the trail."*[21]

There are numerous money laundering typologies[22] and therefore those examples are by no means the only money laundering methods.[23] In recognising the importance of the *placement stage* some countries introduced measures to circumvent and frustrate attempts by launderers to introduce illegal gains into the financial system at that stage of the money laundering process.[24] Bearing in mind that the proceeds of most illicit activities are cash based[25] the natural inclination was to introduce measures that would assist in identifying the origins and provenance of the cash. One such method that was employed by the USA and Australia[26] is the Customer Transaction Reporting (CTR) mechanism.[27] This is where the deposit of cash in excess of a certain amount[28] requires the completion of documents for the purpose of declaring the source and the beneficial ownership of the funds.[29] Although the CTR mechanism is considered to be an effective anti-money laundering tool, launderers have at times been able to circumvent it by employing a number of persons to make deposits at deposit taking institutions of amounts below the

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[20] Money Laundering: Guidance Notes for Banks and Building Societies, London, 1990, Appendix A: See also Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 30

[21] UNODCCP, "Financial Havens, Banking Secrecy And Money Laundering," 1998 at p. 10

[22] www1.oecd.org/fatf/ - for FATF Reports on Money Laundering and Trends.

[23] Howard C, "Butterworths Money Laundering Law" 2001, at p. 2/1 -2/85 for an overview of the different methods of laundering money.

[24] Hinterseer K., "Criminal Finance, The political Economy of Money Laundering in a Comparative Legal Context" 2002, at p. 18 where efforts by Switzerland enabled it to seize *"...a sum of cash so large that it was described not in millions of dollars but as 1.2 tons of money."*

[25] Arrastia J., "Money Laundering – A US Perspective" in Rider B., and Ashe M., "Money Laundering Control" Sweet & Maxwell, 1996 at p. 236; *"Criminals deal in money –cash or its equivalent. The deposit and withdrawal of large amounts of currency...under unusual circumstances may betray criminal activity."* : See also Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 31

[26] Hinterseer K., "Criminal Finance, The political Economy of Money Laundering in a Comparative Legal Context" 2002, at p. 185

[27] Alldridge P., "Money Laundering Law-Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation Of the Proceeds of Crime," 2003 at pp. 262-263

[28] Ibid at 262 where it is stated that the threshold in the USA is $10,000.00

[29] Ibid

statutory maximum.[30] In this way they were able to avoid the mandatory requirement to produce information about the source of the funds to be deposited.[31] Not only did launderers use different deposit taking institutions[32] but they also made several deposits at the same institution, each of which was less than the maximum at which source of funds documentation was triggered. This process is referred to as 'smurfing.'[33] Deposit taking institutions are therefore required to be extremely vigilant to avoid the abuse of the CTR mechanism in that way.

OFCs such as SVG[34] introduced CTR mechanisms which have no doubt deterred launderers. The days when launderers were able to travel to OFCs with suitcases full of cash[35] are becoming if they have not already become a thing of the past, thus forcing the launderer to become more ingenious in the methods used to conceal the provenance of the cash. As Blum, Levi, Naylor and Williams have stated that; *"...offshore banks do not deal with the general public; nor do they accept cash in suitcases."*[36] They have further observed that;

> *"Contrary to popular stereotypes, only the rankest of amateurs would arrive at the door of a Swiss bank with a suitcase of high denomination United States bank notes and demand to open a numbered account. That would undoubtedly both begin and end the would-be launderer's life of crime."*[37]

Small island OFCs do not provide lucrative markets for organised criminal activities and therefore those large illegal earnings to which reference is made in this chapter cannot be realised in these centres. For example, it was estimated by the FATF that in the USA and Europe alone the profits of drug trafficking yield $232,115 per minute.[38] Similarly, the UN has conservatively estimated that $500bn is laundered each year in

[30] UNODCCP, "Financial Havens, Banking Secrecy And Money Laundering," 1998 at p. 8 *"Equally notorious, in response to the cash transaction reporting systems, are the multiple schemes launderers have devised to get around the reporting rules: prior conversion of cash to checks through formal or informal check-cashing services; breaking cash deposits down to sums below reporting threshold; securing an exemption from reporting and even bribing bank staff."*
[31] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 31
[32] www1.oecd.org/fatf/ - for FATF Reports on Money Laundering and Trends. which provides examples of different methods used by laundering to introduce the proceeds of crime into the financial system
[33] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 31
[34] Section 51 of the Proceeds of Crime Act 1997 (now repealed)
[35] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 32 *"The money courier fills suitcases with cash, hides cash in cargo, or sends cash in an international express package. The money is physically transported to a foreign country that has no currency controls and preferably has banking secrecy laws... In the tax haven country the cash will be deposited into a bank or other financial institution and from there it can be moved at will. The money is now indistinguishable from the legitimate funds that are routinely transferred throughout the world's financial systems."*
[36] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 16
[37] Ibid at p. 8
[38] Howard C., "Butterworths Money Laundering Law," 2001, at p. 1/4

the industrial world.[39] That being the case, the *placement* of the proceeds will usually take place much closer to the markets for organised criminal activities since to do so will obviate the need to transport large bulks of cash by air, land or by sea which would increase the chances of detection.[40] It was for that very reason why it was reported that the deceased Columbian Drug Baron Pablo Escobar lost approximately $US40 million which had rotted in a basement in a house in California because he was unable to place it into the financial system without being detected.[41] The difficulties of transporting cash have been eased by shipping precious metals (e.g. diamonds and gold) and other high valued items that are eventually converted into cash.[42]

The war on money laundering which is fought at the *placement stage* must not only be engaged on the battlefields in the OFCs.[43] In referring to the USA's Banking Secrecy Act 1970 Hinterseer stated that;

> *"In its attack on money laundering the BSA focuses on the placement stage of the money laundering process. It reflects the assumption that it is at this point that the taint of illegality associated with money remains strongest."*[44]

Therefore the FATF member States must make a special effort to eradicate the conditions that are responsible for the war in the first place. These include drug trafficking, trading in illegal weapons and nuclear materials, and trading in human beings.[45] To coin a notable maxim, *'an ounce of prevention is better than one pound of cure.'* Essentially, this means that a greater portion of the resources, should be employed against organised criminal activities and reducing the appetite of the residents of FATF member States for the consumption of illegal substances.

As will be demonstrated later in the chapter the OFCs do not possess the resources and the infrastructures that sustain the organised criminal activities above mentioned. The

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[39] Ibid

[40] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 8 *"Large deposits (whether in cash or in checks) with no apparent justification potentially attract attention. Unlike the situation even a decade ago, so much attention has been focussed on instances when banks accepted a huge bundle of cash from unknown parties and either wired it abroad or converted it into bearer instruments, this avenue is likely going to be used less often."*

[41] Robinson J., "The Laundrymen," 1996 at p. 218

[42] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 7

[43] Ibid at p. 8 *"The usual presumption of law enforcement is that, once the money is inside the banking system, most of the battle is lost."*

[44] Hinterseer K., "Criminal Finance, The political Economy of Money Laundering in a Comparative Legal Context" 2002, at pp. 180-181

[45] Lilley P., – "Dirty Dealing, The Untold Truth About Global Money Laundering," 2000 at p. 8 *"The United Nations estimate that over 500,000 women and girls are entrapped in this modern version of the slave trade each year."*

weapons that are responsible for instilling fear and causing death and carnage are manufactured in the FATF States.[46] The demand for and consumption of illegal substances are a substantial feature of some of those States.[47] The trade in human beings progress from poor States to rich States. Essentially, the dream of living in a more developed country with greater opportunities and democratic societies motivate those whom are traded virtually as slaves. Many of those persons in one way or the other facilitate illegal activities and further the money laundering process. For example it has been reported that;

> *"Sweat shops, in big cities in the industrialised countries hire illegal aliens who are brought in by smuggling groups that may also deal in banned or restricted commodities are financed by loan sharks who may be recycling drug money and make cartel agreements with trucking companies run by organised crime families, all in order to sell their goods cheaply to prestigious and eminently respectable retail outlets that serve the general public. The masses of street peddlers in the big urban centres of developing countries, sell goods that might be smuggled, produced in underground factories using faked brand name labels or stolen from legitimate enterprises, thereby violating customs, intellectual property and larceny laws. They pay no sales or income taxes but make protection payments to drug gangs that control the streets where they operate. The drug gangs might then use the protection money as operating capital to finance wholesale purchases of drugs or arms."*[48]

Moreover, organised criminal activities are fuelled by large sums of money which can only be generated in the FATF States. For those reasons the emphasis, both financial and otherwise should be on eradicating those criminal activities. Although it is accepted that efforts have been made in that regard it does not seem to carry the same international significance as the anti-money laundering initiative. In a UN Report it was stated that:

> *"Today money-laundering attracts the most attention when associated with trafficking in illicit narcotics. However, enterprising, criminals of every sort, from stock fraudsters to cooperate embezzlers to commodity smugglers must launder the money flow for two reasons. The first is that the money trail itself can become evidence against the perpetrators of the offence; the second is that the money per se can be the target of investigation and action."*[49]

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[46] Small Arms Survey 2003, Oxford at p. 13 where it is stated that; *"Based on existing information and research the global volume of small arms production, including both military style small arms and commercial firearms, is estimated in the range of 7.5 million to eight million units per annum. Global production of commercial firearms (approximately 7 million per annum) is dominated by the United States (four million), the countries of the European Union (one million), the Russian Federation (one million), and a handful of other countries such as Brazil, Canada, China, the Czech Republic, Israel, Japan, Switzerland and a few others."*

[47] Lilley P., "Dirty Dealing, The Untold Truth About Global Money Laundering," 2000 at p. 26. *"Drug sales in the United States are estimated by the Office of National Drug Control Policy to generate $57.3 billion annually (and these are 1997 figures). Research has shown that 90% of banknotes in circulation in the United States are contaminated by narcotics – and in London an analysis in 1999 showed that 99% of all bank notes circulating in the Capital are tainted with cocaine, with 1 in 20 exhibiting high levels of the drug, suggesting handling by dealers or actually being used to snort the drug."*

[48] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 13

[49] Ibid at p. 4

It is the responsibility of the FATF States to ensure that the proceeds of crime do not enter the financial system in the first place. Likewise, small island OFCs are also required to act responsibly by maintaining adequate anti-money laundering measures. Launderers have for quite a number of years been reducing the bulk of their cash by converting small denominations into large denominations of the same currency.[50] The developed financial systems in the FATF States facilitate the placement of proceeds of crime through brokerage services,[51] insurances[52] and bureau de exchange services[53] or the buying and selling of properties.[54] Similarly, criminals acquire cash based businesses through which they can commingle licit with illicit cash to avoid detection. Some of those business activities may take the form of retail distribution businesses, vending machines arcades, car washes, laundrettes and restaurants to name a few.[55] It has also been suggested that horse and dog racing provide money launderers with the opportunity to purchase winning tickets at a premium in order to declare the source of funds as being derived from gambling. A similar scheme has been applied to winning tickets from State lotteries.[56] The mere fact that extreme pressure is brought to bear on OFCs is a reflection of the failure of the FATF States to eradicate criminal activities and significantly mitigate the substantial sums of money that are introduced into their financial systems in preparation for distribution worldwide and in many instances OFCs.

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[50] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 31 *"...in the United States it has become common practice for criminals to engage the services of numerous individuals to convert cash in small denominations into larger bills – a process sometimes known as the 'refining' of dirty money."*

[51] FATF on Money Laundering Report 1995-1996 Annex 3 p. 7; *"A number of features make this business an attractive target. First, it is by its nature international. Brokerage firms frequently have offices all over the world and its ordinary for transactions to be conducted by wire transfer from, to or through multiple jurisdictions. Second, the securities markets are highly liquid. Purchases and Sales can be made and settlements consummated within a very short period of time. Third, securities brokers operate in a comprehensive environment. Because their compensation is often based primarily on sales commissions, there is ample incentive to disregard the source of client funds. Finally, in some countries, securities accounts can be maintained by brokerage firms as nominees or trustees, thus permitting the identities of the beneficiaries to be concealed."* See also Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at pp. 34-35

[52] Howard C., "Butterworths Money Laundering Law," 2001 at p. 2/42-48 – 2/51

[53] Ibid at p. 2/41

[54] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 6 *"Someone wishes to wash money buys a piece of property, paying with formal bank instruments and legitimately earned money for a public recorded price that is much below the real market value. The rest of the purchase price is paid in cash under the table. The property is then resold for the full market value and the money recouped, with the illegal component now appearing to be capital gains on a real estate transaction."*

[55] Ibid

[56] Ibid

The extent of the contribution that was made by FATF member countries to the money laundering process can be gleaned from the figures that are depicted on **Table 1** below. In that Table John Walker[57] has attempted to capture the global money laundering flows, which in effect showed that the money laundering activities that were originated in Europe and North America were valued at $985 billion and $681 billion dollars respectively. Together they represented 58.5% of the total value of global money laundering activities which were estimated at $2.85 trillion each year. Moreover, the overall money laundering flows in Europe and North America were $1,281 and $686 respectively, which in essence accounted for 69% of global money laundering flows.

[57] Walker J., "How Big is Global Money Laundering," JMLC, 1999, Vol. 3, No. 1 pp. 25-37 at pp. 31

Table 1: Estimates of the Money Laundering Flows Around the World ($USbn/year)

	Money Laundering Destinations												
World Region	*E Asia*	*S Asia*	*SW Asia*	*Australasia*	*N Africa*	*South Africa*	*Europe*	*S America*	*C America*	*Caribbean*	*N America*	*Total generated*	*Outgoing*
ML origins													
E Asia	298	1	6	2	1	1	18	0	0	1	1	329	31
S Asia	0	3	0	0	0	0	0	0	0	0	0	4	1
SW Asia	0	0	17	0	0	0	1	0	0	0	0	18	1
Australasia	1	0	0	2	0	0	1	0	0	0	0	4	2
N Africa	0	0	0	0	5	0	0	0	0	0	0	6	1
S Africa	0	0	1	0	0	15	2	0	0	0	0	19	4
Europe	7	0	9	1	1	1	985	0	0	2	1	1,006	21
S America	0	0	0	0	0	0	2	24	0	3	1	31	7
C America	0	0	0	0	0	0	1	0	18	3	1	24	5
Caribbean	0	0	0	0	0	0	0	0	0	6	0	6	0
N America	15	0	20	13	7	5	271	22	54	316	681	1,403	721
Antarctica	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Laundered	322	5	52	18	15	21	1,281	47	73	31	686	2,850	
Incoming	24	2	36	16	9	6	296	23	54	325	4		

John Walker Model of Global Money Laundering Flows, 1999.

2.4.2 The Layering Stage

It is at the *layering stage* of the money laundering process that further attempts are made not only to hide the provenance of the funds but more importantly to conceal its true ownership.[1] Having been placed into the financial system the funds may either be further invested and utilised onshore or wire transferred[2] to another or other countries, preferably OFCs because of the secrecy provisions and in some cases the geographical distance.[3] The structure of the OFCs makes them vulnerable at this stage. The banking secrecy and confidentiality laws[4] and the liberal offshore financial legislation provide a safe haven for money launderers. Those characteristics have also caused Senator William Roth to retort:

> *"...we have repeatedly heard testimony about major narcotics traffickers and other criminals who use offshore institutions to launder ill-gotten profits or to hide them from Internal Revenue Services. Haven secrecy laws in an ever increasing number of cases prevent U.S. law enforcement officials from obtaining the evidence they need to convict U.S criminals and recover illegal funds. It would appear that offshore haven secrecy laws is the glue that holds many U.S criminal operations together."*[5]

It is nonetheless difficult to see how banking secrecy laws can be the glue that holds US criminal operations together when it is usual for such laws to be waived when there is a criminal investigation in progress.[6]

The international business companies (IBCs) and international trusts are the two main offshore entities that were used by launderers. In referring to IBCs a UN Report has suggested that; *"...virtually all money laundering schemes use these entities as part of the scheme to hide the ownership of assets.*[7] Moreover, Beare and Schneider have observed that;

> *"...the incorporation, financing and operation of companies satisfy three prime objectives of a laundering vehicle. It allows criminals to convert illicit cash into other*

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[1] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 29
[2] Ibid at p. 33 *"...wire transfers are probably the most important layering method available to money launderers. They offer criminals many advantages as they seek to cover their trail. Speed, distance, minimal audit trail, and increased anonymity amid the enormous daily volume of electronic fund transfers are all major benefits."*
[3] Ibid
[4] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 17
[5] Crime and Secrecy: The Use of Offshore Banks and Companies, Committee on Governmental Affairs Report to the United States Senate. Report 99-130 (August 1985), p. 4 : See also UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 2
[6] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 9
[7] Ibid at p. 60

> *assets, create a perception of a legitimate source of funds, all the while effectively concealing the true beneficial owner- the criminal enterprise.'*[8]

In some OFCs SVG included, IBCs could be incorporated with bearer shares (see chapter 4) which were easily transferable from one owner to the next without any regulatory requirement to have the transfer recorded in a share register. Accordingly, it was virtually impossible to determine the identity of the owner of the bearer shares.[9] SVG has now by way of legislation immobilised bearer shares.[10] This was done by requiring offshore services providers to retain custody of the bearer shares and to maintain records which show particulars of the owners of those shares.[11] In SVG IBCs were not required to submit annual returns and were not in any way mandated to conduct any commercial operations. In essence, they could conduct any type of business activity that was not prohibited by the offshore legislation. For example, they could be used in a process called double invoicing where an IBC pays a fictitious invoice that is presented to it by the launderer.[12] Alternatively, the launderer may invoice a third party for goods or services that have been legitimately provided by the launderer. However, rather than the invoice being issued for the actual amount directly from the launderer to the third party, he may instead invoice an IBC for a lower amount and the IBC will in turn invoice the third party for the actual value of the goods or services that were provided.[13] In this way the launderer is able to understate his sales and minimise his tax.[14] There have also been instances in which launderers have overstated invoices in order to justify the level of sales and the amount of money that is being deposited. As Professor Gilmore has observed:

> *"Such offshore...corporations have a special utility at the placement and layering stages of the operation. In the latter context it is not uncommon for several such companies in different jurisdictions to be used in an effort to eliminate the audit trail. In many cases, however, the overall needs of the criminal will require that the funds are eventually repatriated in such a way that it appears they have been legitimately acquired abroad."*[15]

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[8] Beare M., & Schneider S., "Tracing of Illicit Funds: Money Laundering in Canada," 1990 at p. 183: See also Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 37

[9] Ali S., "Money Laundering Control in the Caribbean" 2003, at p. 38

[10] Section 22 (1) of the International Business Companies Act 1996 (as amended) provided that: *"Any share certificate issued to bearer shall not be distributed but shall be retained in the safe custody of the registered agent for the corporation which issued such certificate in St. Vincent and the Grenadines."*

[11] Ali S., "Money Laundering Control in the Caribbean" 2003, at p. 38

[12] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 39

[13] Ibid

[14] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 8

[15] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 38

The international trusts on the other hand could have been registered without any requirement for the revelation of its true beneficial owner.[16] The settlor was not prohibited from retaining control of the trust.[17] Essentially, the launderer could have concealed the provenance of the funds and the real beneficial ownership thereof. It was the ideal situation for the launderer. Interestingly, although OFCs were not established for that purpose and for the most part did not condone money laundering they nonetheless facilitated the money laundering process.[18] The relatively liberal offshore laws coupled with restrictions on the disclosure of beneficial ownership made it extremely difficult for law enforcement officials to investigate, apprehend and procure convictions of launderers and organised criminals if they were separate individuals. Launderers were therefore left with the freedom of employing bright lawyers and accountants to develop complex financial structures which remove the true beneficial owner further away from its source. For example a structure may consist of a bearer share IBC which establishes an international trust[19] as the settlor and another bearer share IBC as the beneficiary. In this way the beneficial ownership of the IBCs are concealed. Moreover, the trust adds another layer to the structure by maintaining the distance of the settlor and beneficial owner and still enables that owner to have significant influence over the administration of the assets of the trust either through a letter of wishes or a concept referred to as protectorship.[20] Other layers may also be added. For example an international trust may establish an insurance company[21] which may establish several other IBCs for investment purposes. Each step in the registration process moves the true beneficial owner company further away from the funds and the provenance of the funds become a distant past. As Ali has pointed out; *"For a settlor with criminally derived wealth, the trust would seem to be a useful weapon for shielding property from seizure, since it is placed outside his ownership and control"*[22]

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[16] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 61

[17] Ibid

[18] Ibid at p. 9 where it was stated that *"...there are many perfectly legal reasons for the establishment of an offshore trust."*

[19] Ali S., "Money Laundering Control in the Caribbean" 2003, at p. 39

[20] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 61: See also Section 16 of the International Trusts Act 1996 which provides that, *"the terms of an international trust may provide...for the position of the protector of the trust."* Section 17(1) of the International Trust Act 1996 provides that; *"A trust instrument may also provide for the appointment of one or more trust advisors who, acting alone or in concert may offer advice to a trustee or a protector but who shall not be deemed to be bound by the duties of either."*

[21] Ali S., "Money Laundering Control in the Caribbean" 2003, at p. 39

[22] Ibid at p. 40

Unravelling the complex offshore structures may become more perplexing for law enforcement officials where the launderer is able to acquire his own bank through which he launders the proceeds of crime and leaves no paper trail as evidence of his laundering activities.[23] However, offshore banks are mainly used for tax minimisation and to avoid liquidity and interest rate limitations and not for the purpose of hiding money.[24] This is not to say that they have never been acquired by criminals. But criminals do not necessarily pursue the acquisition of offshore banks alone. They have acquired onshore banks as well. As one writer pointed out;

> *"The Rodriguez Orejuela brothers, Miguel Angel and Gillberto, created an economic and public relations empire which had as its cornerstone the Banco de lo Trabajadores (workers bank). The Rodriguez brothers understood that running a bank would not only permit them to launder drug money, but, through the business of savings accounts and lending, would allow them a structure with which to approach and cultivate public relations."*[25]

2.4.3 The Integration Stage

Having layered the funds into different structures the launderers commence the process of integrating the funds into the financial system. This may involve transferring the funds to different accounts in different parts of the world[26] before repatriating the funds to the country in which the launderer resides. As Blum, Levi, Naylor and Williams suggested;

> *"Probably the neatest solution of all is to bring the money home in the form of a business 'loan.' The criminal arranges for money held in an offshore account to be 'lent' to his/her on-shore entity. Not only is the money returning home in complete non-taxable form, but it can be used in such a way as to reduce taxes due on strictly legal domestic income. Once the 'loan' has been incurred, the borrower has the right to repay it, with interest, effectively to himself or herself. In effect, the criminal can legally ship even more money out of the country to a foreign safe haven while deducting the 'interest' component as a business expense against domestic taxable income. With the employment of various 'loan back' techniques, the money laundering cycle is not merely closed, it can actually be increased in diameter."*[27]

Once the *integration stage* of the money laundering process has been completed undetected it is extremely difficult for law enforcement officials to follow the money

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[23] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 10
[24] Ibid at p. 16
[25] Varela-Cid E., "Hidden Fortunes Drug Money, Cartels and The Elite Banks" 1999 at p. 50
[26] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 11
"Thus mass communication has facilitated contacts with associates in other countries and continents, modern banking has facilitated international criminal transactions and the modern revolution in electronics has given criminal groups access to new tools enabling them to steal millions and to launder the huge illicit profits."
[27] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 11

trail and to secure convictions for suspected money launderers. As Blum, Levi, Naylor and Williams have observed; *"The more successful the money laundering apparatus is in imitating the patterns and behaviour of legitimate transactions, the less likelihood of it being exposed."*[28]

It must be noted that OFCs were not necessarily the conduits for any or all of the three stages of the money laundering process. All three stages of the process could have taken place in FATF States and there is ample evidence to that effect. In 1999 John Walker published an article[29] in which he proposed a model for estimating the extent of the global money laundering flows. In it he noted that; *"the top 20 countries of origin for laundered money...are developed countries."*[30] His observation is depicted in **Table 2** below which is an identical replication of the information that he presented in the said article.

Table 2: ***The Top 20 Origins of Laundered Money***

Rank	Origin	Amount($US/yr)	% of Total
1.	US	1,320,228	46.3
2.	Italy	150,054	5.3
3.	Russia	147,187	5.2
4.	China	131,360	4.6
5.	Germany	128,266	4.5
6.	France	124,748	4.4
7.	Romania	115,585	4.1
8.	Canada	82,374	2.9
9.	UK	68,740	2.4
10.	Hong Kong	62,856	2.2
11.	Spain	56,287	2.0
12.	Thailand	32,834	1.2
13.	South Korea	21,240	0.7
14.	Mexico	21,119	0.7
15.	Austria	20,231	0.7
16.	Poland	19,714	0.7
17.	Philippines	18,867	0.7
18.	Netherlands	18,362	0.6
19.	Japan	16,975	0.6
20.	Brazil	16,786	0.6
Total All countries		2,850,470	100.0

John Walker Model of Global Money Laundering Flows, 1999

Moreover, **Table 1** above has also shown the extent to which the illicit proceeds originating in Europe and North America were also laundered within those regions. The

[28] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 12
[29] Walker J., "How Big is Global Money Laundering," JMLC, 1999, Vol. 3, No. 1 pp. 25-37
[30] Ibid at p. 33

extent of the laundering activities and the countries that were alleged to have played a major role in facilitating those activities are depicted on **Table 3** below.

Table 3: ***Top 20 Flows of laundered money***

Rank	Origin	Destination	Amount($USm/yr)	% of Total
1.	US	US	528,091	18.5
2.	US	Cayman Islands	129,755	4.6
3.	Russia	Russia	118,927	4.2
4.	Italy	Italy	94,834	3.3
5.	China	China	94,579	3.3
6.	Romania	Romania	87,845	3.1
7.	US	Canada	63,087	2.2
8.	US	Bahamas	61,378	2.2
9.	France	France	57,883	2.0
10.	Italy	Vatican City	55,056	1.9
11.	Germany	Germany	47,202	1.7
12.	US	Bermuda	46,745	1.6
13.	Spain	Spain	28,189	1.0
14.	Thailand	Thailand	24,953	0.9
15.	Hong Kong	Hong Kong	23,634	0.8
16.	Canada	Canada	21,747	0.8
17.	UK	UK	20,897	0.7
18.	US	Luxembourg	19,514	0.7
19.	Germany	Luxembourg	18,804	0.7
20.	Hong Kong	Taiwan	18,796	0.7
Total All countries			2,850,470	100.0

John Walker Model of Global Money Laundering Flows, 1999

Walker pointed out that;

> *"It is interesting... to note how much of the laundered money...flows to already developed countries – particularly the USA and Europe. The potential of money laundering to widen the gap between the rich countries and the poor countries is another important issue that can be tested using a model of this kind."*[31]

That statement is very interesting because it highlights the likely impact on poor countries due to the prevalence of money laundering. It was a very significant issue which should have been given very serious attention and which should also have been emphasised by the FATF in its efforts to implement the anti-money laundering initiative. The fallacy is usually that OFCs at all times participate in at least one of the laundering stages. It must however be borne in mind that some of the vehicles that were provided by the OFCs and were needed to facilitate the money laundering process could also have been obtained in some FATF States.[32] The mere fact that within recent times monies are wire-transferred to OFCs is a clear indication that those funds had actually

[31] Walker J., "How Big is Global Money Laundering," JMLC, 1999, Vol. 3, No. 1 at p. 34
[32] For example, Hong Kong, Ireland Luxembourg, Switzerland, United Kingdom, USA

been placed in the financial system elsewhere and their provenance and beneficial owners already concealed. But even so, Walker's model of global money laundering flows revealed that only three small island OFCs[33] were listed among the top 20 destinations of laundered money (see **Table 4**). It is once again evident that the developed countries, including the FATF member countries were the major finance centres for money launderers.

Table 4: *The Top 20 Destinations of Laundered Money*

Rank	Destination	Amount($US/yr)	% of Total
1.	US	538,145	18.9
2.	Cayman islands	138,329	4.9
3.	Russia	120,493	4.2
4.	Italy	105,688	3.7
5.	China	94,726	3.3
6.	Romania	89,595	3.1
7.	Canada	85,444	3.0
8.	Vatican City	80,596	2.8
9.	Luxembourg	78,468	2.8
10.	France	68,471	2.4
11.	Bahamas	66,398	2.3
12.	Germany	61,315	2.2
13.	Switzerland	58,993	2.1
14.	Bermuda	52,887	1.9
15.	Netherlands	49,591	1.7
16.	Liechtenstein	48,949	1.7
17.	Austria	48,376	1.7
18.	Hong Kong	44,519	1.6
19.	UK	44,478	1.6
20.	Spain	35,461	1.2

John Walker Model of Global Money Laundering Flows, 1999

On the basis of the foregoing, it is contended that OFCs were facilitating the integration stage of the laundering process but were not mainly responsible for the global money laundering problem. Nonetheless, Savona and Defoe have observed that;

> *"The Royal Hong Kong Police reports that a money launderer was employed to cleanse cash from the street sale of heroine in Australia. The hired money launderer utilised the cash to purchase kruggerrands and kilogram gold bars, which he then carried into Hong Kong and placed in safety deposit boxes. The gold was sold a few kilograms at a time over the counter at a Hong Kong bank. The proceeds of the sale of the gold were wire transferred to shell company accounts in the Channel Islands, Zurich, New York and Vanuatu. The money launderer requested that the proceeds of one particular sale be paid in the form of a number of demand drafts, which were traced to Manila where they had been cashed by the bearer. A total of HK$13, 812,000 in drug proceeds was remitted from Hong Kong"*[34]

[33] Cayman Islands, Bahamas and Bermuda

[34] Gilmore W., "Dirty Money- The Evolution of the Money Laundering Countermeasures," 1999 at p. 40

From the example given above, it is noticeable that the ownership and provenance of the funds had already been disguised and concealed prior to the monies being wire-transferred and mailed from Hong Kong to the other jurisdictions. In those circumstances OFCs become vulnerable to money launderers. The drafts would have been prepared and the funds would have been transferred by a bank, thus adorning those bank drafts and the funds with an appearance of legitimacy.[35] For the most part OFCs are used for legitimate business activities but just as the financial system in FATF States are abused and manipulated to facilitate money laundering, so too are OFCs. It cannot therefore be considered fair to attribute blame solely to OFCs for the evils of money laundering when effectively the crimes from which the funds are generated usually take place in the FATF countries and the *placement* of the proceeds of crime is usually in those States.

In recent times OFCs may only be used in the layering and integration stages and this may be after the provenance and ownership of the proceeds of crime had already been concealed and disguised. Moreover, there was no concrete evidence that such usage was more prevalent in the OFCs than the FATF States. The John Walker's model of global money laundering flows (see Tables 1, 2, 3 and 4 above) has revealed otherwise, in that the FATF member countries were the main facilitators of money laundering activities. What therefore is the reason for attributing to OFCs the blame for the money laundering debacle?

2.5 Money Laundering and the Services Sector

The OECD/FATF countries have been experiencing economic progress on the back of globalisation and trade liberalisation. The growth of those countries is particularly evident in the proportion of the working population that is now employed in the services industry. It has been estimated that in the United Kingdom one out of every five persons is employed in manufacturing. Similarly, the decline in workers in the manufacturing sectors is also a feature in the USA, which is estimated at one in six and in Germany one in three.[36] Not surprisingly, except for Turkey, Greece and Portugal, over 50% of

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[35] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 11 *"In essence, the rule in successful money laundering is always to approximate, as closely as possible, legal transactions. As a result the actual devises used are themselves minor variations on methods employed routinely by legitimate business."*
[36] Lowenfeld A., "International Economic Law," Oxford, 2002 at p. 111

the work force in the OECD countries is employed in the services sector.[37] In essence, the services industry contributes in excess of 50% of the combined GDP of the OECD countries.[38] The implication of the growth in the services sector of any country has been suggested by a UN Report as favourable to the proliferation of money laundering.[39] The Report suggested that:

> *"The best cover for money laundering is a business engaged in legitimate retail trade, especially one that generates large amounts of cash on a regular basis. The higher the services content of the products sold, the greater the potential to use the legitimate retail business to hide the proceeds of crime. It is much easier in services to cloud the audit trail, since there is seldom as clear a relationship between physical inputs and the market value of outputs in a service firm as there is in one supplying physical goods. Tax authorities have long been aware that it is simpler in the services than in the physical goods industries to skim off income and under report earnings. It is equally easy to do the opposite, to mix illegally earned with legally earned income and report it all as if it were legal. A simple rule is: other things being equal, the higher the ratio of services to physical goods production in a country's GNP, the greater the facility with which its legitimate business firms can be used for laundering money."*[40]

Therefore, due to the fact that the substantial sums of money that are generated from criminal conduct are earned in the OECD/FATF countries (see below) and in the light of the magnitude of the burgeoning services sector,[41] the proliferation of money laundering activities(see chapter 1) in those countries is not surprising. It highlights the need for the OECD/FATF countries to introduce effective measures to deal with the root causes of the money laundering problem. These causes can be categorised under two headings, namely, crime and the *placement* of the proceeds of crime into the financial system, both of which were common features in the OECD/FATF countries. Similarly, continued and justified pressure should be brought to bear on OFCs who facilitate the money laundering process at the *layering* and *integration* stages. However, in so doing the OECD/FATF must be prepared to accept and acknowledge that their role in the money laundering process should be greater, since without crime there will be no proceeds of crime and if there are no proceeds, there will be nothing to place into the financial system; if there is nothing to place in the financial system there will not be any money laundering activities for the OFCs to facilitate. The mere fact that the *placement* stage is centred within the OECD/FATF countries and it is reported that approximately $2.85 trillion is laundered each year, if OECD/FATF's law enforcement officials with substantial resources are unable to stem the flow of illicit funds, how can small OFCs

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[37] Lowenfeld A., "International Economic Law," Oxford, 2002 at p. 111
[38] Ibid
[39] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 13
[40] Ibid
[41] www.oecd.org where it is stated that the OECD countries produce two thirds of the world's goods and services.

with relatively infinitesimal resources be more efficient and effective? Is it that the OECD/FATF countries are expecting more competence from OFCs than they seem to be demonstrating in their fight against organised crime and money laundering?

2.6 Money Laundering and Organised Crime

Within recent times there has been an increased global effort to fight organised crime, yet it still flourishes and money laundering progresses unabated. Such a situation has led Peter Lilley to conclude that:

> *"The rise in organized crime is now an accepted, if regrettable fact of global business life. The massive sums of money generated by such activity need to be legitimised by inserting and washing them in international banking and business systems. Running parallel are the globalisation and internationalization of markets; the sophistication of information technology and the uncertain political and economical environments..."*[42]

It has been reported that organised crime is the world's third largest industry after the international oil trade and foreign exchange.[43] However, this has now been surpassed by the drug trafficking industry which was reported to have approximately 400 million regular customers and generated annual revenues of $400 billion, half of which was laundered internationally.[44] In essence, organised crime seemed to have become the largest industry in the world. Many[45] attribute the increase in organised criminal activities to globalisation and trade liberalisation. As one writer pointed out;

> *"Modern technology has provided new impetus not only to legitimate trade and commerce, but also to criminal business enterprises. Thus, mass communications have facilitated contacts with associates in other countries and continents, modern banking has facilitated international criminal transactions and modern revolution in electronics has given criminal groups access to new tools enabling them to steal millions and launder huge illicit profits."*[46]

Whereas it may be correct to state that improvements in technology, the formation of regional blocs and the advent of trade liberalization have contributed significantly to the increase in organized criminal activities, it may also be the case that with the emphasis

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[42] UNODCCP "Financial Havens, Banking Secrecy and Money Laundering" 1998 at pp. 2-3
[43] Howard C., "Butterworth Money Laundering Law" 2001 pg 1 / 3
[44] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering 2000, at p. 3
[45] Friman R., & Andreas P., "The Illicit Global Economy and State Power," Rowman & Littlefield Publishers, 1999 at p. 54 : Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 100 : Lilley P., "Dirty Dealing- The Untold Truth of Money Laundering," 2000 at p. 34 : Williams P., "Organizing Transnational Crime: Networks, Markets and Hierarchies" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," ISPAC, 2001 at p. 66
[46] Gilmore W, "Dirty Money-The Evolution of Money Laundering Countermeasures" 1999 at p. 11

being placed on money laundering over the past ten years, insufficient attention was given to the underlying criminal activities that gave rise to money laundering. Consequently, whilst the war against organized crime concentrated on the circulatory system of organized criminal activities, the criminals set about engaging the services of well trained financial mercenaries to fight that war in order to circumvent the money laundering initiatives. In the meantime, organized crime was given a breathing space that was used to plan, organise and in many cases merge with each other in order to effectively execute their nefarious activities (see para 2.7 below). In that regard the statement made by the Financial Crimes Enforcement Network(FINCEN) of the USA is very instructive. It clearly indicates that there may well be a weakening of the stance in the fight against the underlying criminal activities and a strengthening of resolve against money laundering. Accordingly, FINCEN pointed out that:

> *"With few exceptions criminals are motivated by one thing-profit. Greed drives the criminal, and the end result is that illegally gained money must be introduced into a nation's legitimate financial systems...Money laundering involves disguising assets so they can be used without detection of the illegal activity that produced them. This process has devastating social and economic consequences. Money laundering provides the fuel for drug dealers, terrorists, arms dealers to operate and expand their operations...Left unchecked, money laundering can erode the integrity of our nation's and the world's financial institutions."*[47]

On the basis of the foregoing, it is clear that the eradication or significant mitigation of organized criminal activities is pivotal to the money laundering process. So long as those activities continue unabated, there will always be a money laundering issue for the reasons aforementioned, since criminals will go to all lengths, corruption and murder included, to ensure that their criminal activities are not in any way frustrated. No doubt the FATF is aware of the existence of such a situation, thus the reason for bringing pressure to bear on small island OFCs that were alleged to be facilitating the money laundering process.

It is contended that whereas, money laundering is indeed a global concern, organized and transnational criminal activities, pose a much greater threat to humanity and should therefore be given the major share of attention. Emphasis will be given to this view in support of the arguments about the deficiencies and the inadequacies of the FATF initiatives on small island OFCs. For that reason an understanding of organized crime is required so that its role in the money laundering process in small island states can be put

[47] The United States Department of the Treasury Financial Crimes Enforcement Network, FINCEN Advisory, March 1996, 1, Issue 1.

into its proper perspective, especially if it is believed that the love of money is the prime motivational factor to increased and sustained criminal activities.[48]

To gain such an understanding of organized crime within the context of money laundering world wide and the Caribbean small island States in particular, it is important to show why there has been such a marked escalation in organized criminal activities; the types of organized criminal activities that earn substantial sums of money; and the extent to which governments through their domestic and foreign policies and in order to achieve their economic and political[49] objectives have facilitated organised criminal activities. To effectively embark upon such an approach requires firstly, at least a general appreciation of what is meant by organized crime, secondly the historical imperatives of organized crime and thirdly, the impact of organized crime on the twentieth century civilization.

2.7 What is Organised Crime?

Organized crime has been defined as, *"any enterprise or group of persons engaged in continuing illegal activity which has as its primary purpose the generation of profits irrespective of national boundaries."*[50] This definition though sound in its general context has failed to clearly and expressly indicate or even recognize that there are circumstances where the profits earned from illegal activities are not the primary reasons for those activities. There are times when illegal activities are the means to an end and although the end may for the criminals justify the means, this does not mean that the means were their primary aim. Take for example the terrorists who rob banks and engage in racketeering.[51] Those activities are only the means to achieving the end, which is financing their main objective, the destruction of human lives and property in

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[48] The United States Department of the Treasury Financial Crimes Enforcement Network, FINCEN Advisory, March 1996, 1, Issue 1.

[49] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 68 " *...the CIA's Contra support operation coincided with major expansion in the Caribbean cocaine trade and that the coincidence between cocaine trafficking and covert operations made the DEA's task of drug interdiction almost impossible. Assuming that the United States maintained the relationships in Southeast Asia, Pakistan, and Central America as described, the CIA inspector general's conclusion that the agency needed an assessment of the possible adverse repercussions' of its relations with drug dealers seems mild. In any case, there is considerable evidence that individuals in the United States government have been consciously involved in the facilitation of narcotics trafficking for political purposes."*

[50] See memorandum submitted by Interpol and reproduced in the House of Commons, Home Affairs Committee, Organised Crime, H.C. Paper 18-11 1994-95 at pg 150

[51] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," ISPAC, 2001 at p. 104

order to satisfy or further their political[52] or religious beliefs[53]- and what about the inveterate offender? Is he motivated by profits or the acquisition of wealth? Although one may justifiably argue that such a person does not amount to a group or an enterprise it is possible that, that person could well be extremely influential within a criminal grouping and may therefore dictate the course of action taken by the membership of the organisation to which he belongs.

There have been many stories of the wealth of many of the leaders of organized crime syndicates. Some of them own planes, ranches, farms, castles, ships.[54] Their wealth extends beyond the GDP of many developing countries[55] and is significantly more than is required to lavishly sustain them and/or their families during their entire lifetimes. For example, it has been reported that the Columbian drug trafficker Carlos Lehder Rivas at one time owned an extremely large property at Norman's Key in the Bahamas, a fleet of five small aircraft, several farms and estates in Armenia and a hotel "The German Inn," just to name a few.[56] On the other hand Pablo Escobar is reputed to have owned *"200 apartments scattered throughout Florida, an airline and a hotel in Venezuela, another airline in Bogota, and several hotels in Medellin. He also owned an estate, known as 'Hasienda Napoles,' that featured its own zoo and boasted a list of 843 personnel."*[57] If the primary aim of organized criminals was solely to make profit, it is reasonable to assume that many may not have been incarcerated[58] and some would have been alive today.[59] It is therefore contended that with such vast amounts of wealth, it is highly probable that they would have eventually become so risk averse that the marginal increase in risk that would have accompanied every additional illegal activity, would have exceeded the incremental utility of an additional increase in earnings from illegal activities. Therefore, to state that their initial aim was to maximise profits and to acquire wealth and power may be the preferred position to advocate.

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[52] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," ISPAC, 2001 at p. 104
[53] For example the attack using two planes on the Twin Towers of the World Trade Centre in New York and the crashing of a plane into the Pentagon in Washington by the terrorist Al Qaeda Network on 11th September, 2001.
[54] Varela-Cid E., "Hidden Fortunes, Drug Money Cartels and Elite Banks" Hudson Street Press, New York, 1999 at pp 50 -59.
[55] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 18
[56] Varela-Cid E., "Hidden Fortunes, Drug Money Cartels and Elite Banks" York, 1999 at pp 40 & 42.
[57] Ibid at p. 36
[58] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 78 where its was noted that 1,500 politicians and businessmen were arrested in Italy in the first two years of Operation Clean Hands. See also p. 83 where over 166 persons in Colombia were arrested.
[59] Ibid at p. 82 –the death of Pablo Escobar

The extent of the wealth of organized crime syndicates in some countries dwarfs the GDP of the countries in which they are based.[60] Their power, wealth and influence are so imposing that certain villages and even countries depend on the investments of those criminals for their survival.[61] With such power and authority they pose a significant threat to the sovereignty[62] of certain states. In many respects they dictate political and economic policies by ensuring that their golden boys are catapulted into the political directorate[63] or by scaring away those who overtly oppose their criminal activities.[64] It is from this vantage point that they wield their power and authority and influence change in the direction that they consider most desirable.

It is contended that having acquired a vast amount of wealth many of those involved in criminal activities are then motivated by power and self-preservation. Those who have already acquired wealth and are motivated by power are the driving forces behind these criminal activities.[65] They possess the capacity to keep the criminal machinery well oiled, operational and sustainable. They relish the status of being the godfather and so they threaten and if necessary, kill and maim[66] those who oppose their activities or bribe[67] and corrupt every one who comes within yards of them in order to maintain that power and self-preservation. In that regard Varela-Cid observed that;

> *"Once back in Colombia, a young inexperienced judge convicted Jorge Luis Ochoa for illegal importation of bulls, and sentenced him to two years in prison. Three months later, after an appeal, the same judge released Ochoa on a bail of $11,500, and required him to appear before the tribunal twice a month. Ochoa was never tried for drug trafficking, although authorities continued attempting to do so for many years.*

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[60] Williams P., "Organizing Transnational Crime: Networks, Markets and Hierarchies" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," 2001 at p. 67

[61] Varela-Cid E., "Hidden Fortunes, Drug Money Cartels and Elite Banks" 1999 at p. 37 in referring to the assistance given by a drug trafficker to the town of Nicoli it was stated that; *"His fame grew to such a point that the parson of Necoli, a town not far from Medellin, nonchalantly expressed to a newspaper: 'Our town would be nothing without Mr. Campo. The people see this man as the work of God. Who has arrived to help with our development projects.'"*

[62] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 98

[63] Varela-Cid E., "Hidden Fortunes, Drug Money Cartels and Elite Banks" 1999 at p. 38 *"Another powerful Colombian drug trafficker was Severo Escobar Ortega, who specialized in transporting cocaine from Bogota to Miami and New York. He was an inspirited, conservative leader who had quickly become an important businessman. Backed by ex-Senator Bertha Henandez de Ospina, who had readily accepted his contribution of $1 million, he won a seat in the House of Representatives. After his stint in the House, he assumed the post of secretary of agriculture, and with state funds ordered the construction of a luxurious pool in the municipality of Medina. Later it was discovered that the dressing rooms were actually laboratories for cocaine refinement."*

[64] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 82 where it has been reported that presidential candidates have been assassinated in Colombia.

[65] Ibid at pp. 50-59

[66] Ibid at pp 34-37

[67] Ibid at p. 21-22 where an assassin was able to bribe the State Registrar for a new identity.

> *After her decision to free Ochoa, the judge disappeared and is believed to be living in Europe. According to Drug Enforcement Authority reports, after freeing Ochoa, the judge met with Fabio Ochoa and Pablo Escobar, who gave her a payment of about $5 million.*[68]

Even with all that wealth, there still appears to be a chilling fear within them - the fear of allowing some other criminal or criminal organization to surpass them in terms of wealth and the capacity to wield more power and authority.[69] When they have reached that stage, it is contended that illegal profits then becomes a means to an end and not the end or primary objective as the aforesaid definition clearly indicates.

Further analysis of the definition of organized crime was conducted by Frank Hagan who concluded that the majority of American criminologists are of the view that, organized crime involves a continuing enterprise operating in a rational fashion and focused towards obtaining profits through illegal activities.[70] This description was criticized by Letizia Paoli on the basis that; *"the associations that are thought to be prototypical of organized crime are neither exclusively involved in illegal market activities, nor is their development and internal configuration the result of illegal market dynamics."*[71] Whilst it is indeed correct to conclude that organized criminals like the mafia, the drug cartels and other associations are engaged in legitimate commercial and business ventures, it is contended that Frank Hagan's description of organized crime should not be construed as narrowly as was indicated by Paoli. Hagan does not indicate that organized criminal enterprises are engaged exclusively in illegal activities. As a matter of fact the description referred to 'a continuing enterprise' in the context of a conduit through which illegal activities are conducted. This conduit may well have been established, developed and configured legally and legitimately to conduct legitimate business activities but it may also be used to conduct illegal activities as well. As was noted earlier in this chapter that was the *modus operandi* of organized criminals during their "halcyon" days of prohibition and it was as a result of such conduct that the term money laundering was actually originated.

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[68] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 49

[69] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," 2001 at p. 104

[70] Hagan F., "The Organised Crime Continuum: A Further Specification of a New Conceptual Model" Criminal Justice Review, Vol. 8 (Spring, 1983) at pp. 52-57

[71] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," ISPAC, 2001 at p. 88

Chapter 2. "Money Laundering, Drug Trafficking, Organised Crime and The FATF Member States"

On reviewing the conduct of criminal enterprises mentioned below, it will become evident that the focus of those legal and illegal operations must be on those activities that are illegal. Earlier it was mentioned that money laundering is becoming if not already the world's largest industry and that it is estimated that over $2.85 trillion are laundered every year. The IMF however, estimates that the amount of money that is laundered each year ranges between 2% and 5% of the world's GDP.[72] That being the case, a phenomenal amount of money is earned each year through illegal activities because it is contended that the said $2.85 trillion is only a portion of illegal earnings. In essence, this means that much greater profits are earned as a result of illegal activities than through legal operations. This therefore requires tremendous efforts on the part of those criminal associations to avoid by whatever means being interdicted by the law enforcement authorities. Accordingly, there must be some emphasis or intense focus on the illegal operations in order to be able to generate such returns and to launder those proceeds with impunity.

Another definition or rather description of organized crime was given by Cyril Fijnant *et al* in 'Organised Crime in the Netherlands' where it was expounded that *"organized crime involves groups primarily focused on illegal profits that systematically commit crimes with serious repercussions for society and are capable of shielding these crimes relatively effectively, in particular by way of their willingness to use physical violence or eliminate individuals by means of corruption."* That description of organized crime closely relates to the *modus operandi* of organized criminals who (although the description emphasized, focus on illegal profits) also engage in legitimate activities as well but for the most part to conceal their money laundering activities. The said description of organised crime is an amplification of the description given above by Frank Hagan except that it has expressly indicated that criminal organizations as a form of protection of their illegal activities engage in further criminal activities such as violence and corruption. A closer reading of Hagan's description would however reveal that those criminal activities are intrinsic in the description given by Hagan.

On the basis of the aforesaid, the definition of organized crime that is considered to be most applicable to this thesis and the modern day activities of organized criminals is as follows, 'organised crime is the unlawful conduct of a group of persons in association with each other who are engaged in a continuing enterprise, which may commingle licit

[72] FATF-OECD, "Policy Briefs – Money Laundering" OECD Observer July, 1999.

and illicit activities for the purpose of the acquisition of wealth and/or for some other social, cultural, political, religious or economic reason.' It is however important to note that not all criminal activity or groupings may be considered as being organised crime. As Friman and Andreas have observed;

> *"trafficking organizations come in all forms and sizes. While they are often lumped together as organized crime, this is misleading due to the extreme variation in the levels of organization and degree of criminality. Traffickers range from independent entrepreneurs to loose networks of transnational gangs, to highly developed and vertically integrated criminal organizations."*[73]

In an effort to clarify the extent to which criminal groups may be referred to as being involved in organised criminal activity the UN[74] has provided a definition of an organised criminal group as follows:

> *"Organised criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain directly or indirectly, a financial or other material benefit."*[75]

The serious crimes to which the definition relates represent offences that are punishable for a maximum period of at least four years, or a more severe penalty.[76] It has also been provided that ad hoc groups that are formed for the immediate commission of an offence may not be considered as structured groups. However, the mere fact that the structure of the group may not be developed or possess a stable membership does not necessarily mean that it is not a structured group.[77]

2.8 Organised criminal groups

During the early 1980's and the latter part of the 1990's there was a concerted effort by organized criminal syndicates to cooperate with each other in order to avoid detection by law enforcement agencies and to market and distribute their illicit products effectively.[78] There have been reports of cooperation between[79] the organised criminal

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[73] Friman R., & Andreas P., "The Illicit Global Economy and State Power," 1999 at p. 7

[74] United Nations Convention against Transnational Organised Crime 2000 which entered into force on 29th September 2003.

[75] Article 2(a) UN Convention against Transnational Organised Crime, 2000.

[76] Ibid at Article 2(b)- *"Serious crime shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."*

[77] Ibid at Article 2(c) – *"Structured group shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."*

[78] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 79, *"In the post- cold war era the Sicilian mafia, which was thought to have no equal, was joined by other major players. The most*

syndicates in an effort to further criminal activities in a coordinated manner and to avoid conflicts among each other. It has been reputed that these efforts to cooperate resulted in two meetings being held by these criminal associations. One in Aruba in 1987 and the other in Rome in 1992.[80] As a result of the cooperation between the Colombian drug cartels and the Italian Mafia it was agreed that the Colombian drug cartels would have exclusive rights to traffic South American cocaine to Europe.[81] It is this type of organisation and coordination that provide tremendous difficulties for money laundering law enforcement officials. As Lilley has observed:

> *"Money laundering by international criminal enterprises challenges the legitimate authority of national governments, corrupts officials and professionals, endangers the financial and economic stability of nations, diminishes the efficiency of global interest rate markets and routinely violates legal norms, property rights and human rights... In some countries such as Columbia, Mexico and Russia the wealth and power of organized criminal enterprises rival the wealth and power of the government."*[82]

2.8.1 The Colombian Cartels

The Colombian cartels (Medellin and Cali) for years have been ferocious thorns in the side of law enforcement agencies. Between them they have killed countless people within Colombia, ranging from ordinary civilians to prominent persons in the judiciary and the political directorate.[83] They have also been responsible for the assassination of countless military personnel,[84] the deaths of members of the clergy and for the

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prominent ones, besides the Russians, were the Chinese Triads and the Japanese Yakuza. Claire Sterling believes that these three mafias, together with the American and Colombian mafias, have been forming a worldwide criminal consortium."

[79] Ibid at p. 81 where it was stated that the Japan Yakuza has been cooperating with the Cosa Nostra (Italian Mafia) since 1960.

[80] Ibid at p. 98 *"With the help of economic globalisation, organised crime is in a position to operate throughout the world with little political check. The various criminal organisation worldwide are well aware of each other and have developed methods to coordinate their activities. The Sicilian Mafia, Colombian drug cartels, the Turkish Mafia, the Chinese Triads, the Japanese Yakuza, the Russian Mafia and the NCS met in Aruba in 1987 and in Rome in 1992, where they agreed to avoid conflicts, plan common strategies, and peacefully divide the planet among themselves. Orlando Cediel Ospina-Vargas, alias Tony Duran, leader of the Colombian cocaine mafias, planned to use these international connections to launder money in a professional, sophisticated and efficient manner."*

[81] Ibid at p. 77 *"European police sources believe the Sicilian mafia has about fifteen hundred members and close to fifteen thousand accomplices in Sicily, Calabria, Acpulia, Compania, and Naples. Its main income is derived from cocaine and heroin trafficking. It created the new European cocaine market through an agreement with the Colombian drug cartels in which they gave the Columbians 'exclusive rights' for trafficking South American cocaine in Europe."*

[82] Lilley P., "Dirty Dealing- The Untold Truth of Money Laundering," 2000 at p. 6

[83] Friman R., & Andreas P., "Illicit Global Economy and State Power," 1999 at p. 13. *"The Cartels victims by the early 1990s speak to the potential levels of violence that can be generated. The list of those killed within Columbia includes nearly 500 policemen, 40 judges, a minister of justice, an attorney general, a governor, 3 presidential candidates, a number of leading journalists and over 500 civilians to car bombs alone."*

[84] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at pg 82

corruption (through fear, in many cases) of many important and influential persons in the country. It is reported that the Cali cartel alone is worth approximately $US206 billion.[85] One can hardly imagine what would be their combined value as a result of their involvement in the primary illegal activity, drug trafficking. Even with the death of Pablo Escobar of the Medellin Cartel and the incarceration of the Rodriguez Orejuela brothers of the Cali Cartel in 1997[86] and many other important drug traffickers[87] there is still a relentless effort by them to maintain the earnings capacity and influence of their ruthless[88] criminal syndicates.

2.8.2 The Italian Mafias

The Italian Mafias[89] on the other hand have been hard hit[90] by law enforcement authorities over the past ten years or so but even with large numbers of persons being incarcerated they still survive and have been able to diversify their illegal activities into areas that will avoid detection. They are known to be heavily involved in, gambling, loan sharking, extortion, contraband tobacco and the disposal of toxic waste and have been able to secure approximately 20 per cent of the commercial activities in Italy.[91] They have also modified their roles to include money laundering services and the effective management of their network to facilitate the distribution of drugs.

2.8.3 The Mexican Cartels

The Mexican organized criminal associations[92] and the Columbian Cartels have for years been cooperating with each other to smuggle illegal drugs into the USA. The Mexican Cartels account for 20% of the heroin, 60% of the marijuana and 40% of the cocaine that enter the US market.[93] The amount of money that it laundered in 1994 was

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[85] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering 2000, at p. 18
[86] Ibid at p. 18
[87] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 83
[88] Ibid at p. 166 *"...the 1996 murder rate in Medellin was 228 per 100,000 people, compared with the highest murder rate in the United States – 70 per 100,000 people in Washington, DC...More than thirty thousand people were murdered in Colombia, the violence capital of the world, in 1995 alone."*
[89] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering" 2000, at p. 21 -Italian Mafias include, the Cosa Nostra approximately 6000 members; Ndangheta approximately 6000 members; the Camora approximately 7000 members and the Sacra Corona Unta.
[90] Robinson J., " The Merger" The Overlook Press, New York, 2000 at pp. 248-250
[91] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering" 2000, at p. 21
[92] Ibid 19 – Mexican crime syndicates include, Tijuana cartel; the Juarez cartel; the Miguel Caro-Quintero organization and the Gulf cartel:
[93] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at pp. 84-88

estimated to range between $3 and $6 million.[94] One of its cartels (Gulf cartel) is estimated to be worth over $10 billion.[95] By forging links with each other, organized criminals have been able to avoid and evade the law enforcement authorities and achieve their objectives. There are reports of ingenious methods[96] being used to smuggle illegal drugs into the lucrative markets of Europe and the USA and with extensive cooperation from the Mexican crime syndicates and the Italian Mafias, the task of interdiction becomes extremely difficult.

2.8.4 The Japanese Yakuza

The Japanese Yakuza has been established for centuries[97] and has been built around the principles of loyalty and brotherhood. It is considered to be the largest industry in Japan with an estimated annual turnover of $US90 billion.[98] The membership of such an association is estimated at 100,000 persons who are mainly involved in loan fraud, extortion, prostitution and drug trafficking. The Yakuza is known to have spread its wings into the western regions of the USA and concentrates heavily on the real estate business as one of its main activities outside of Japan.[99]

2.8.5 Chinese Triads

Like the Yakuza, the Triads have been established for centuries[100] except that it is believed that the Triads were established long before the Yakuza. The triads are a fusion of three separate criminal organizations in China, being the Won Sing Wo, the Sun Yee On and the Wo On Lok. They are involved in several illegal activities, including fraud, trading in human beings, counterfeiting, drug trafficking, extortion, gambling and money laundering, from which they earn approximately $US200 billion every year.[101] They are believed to be ruthless and control their followers through the precept of fear.

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[94] Ibid at p. 84
[95] Ibid
[96] Ibid at p. 82- where the Cali cartel inserts the coca paste into concrete posts, plastic chairs, slippers and other unusual products.
[97] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," ISPAC, 2001 at p. 89- where it is stated that the Yakuza was established during the early 18th century.
[98] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering 2000, at p. 21
[99] Ibid
[100] Ibid at p. 22 - where it is noted that the Triads may be able to trace their origins back to the 17th century.
[101] Ibid

2.8.6 The Russian Mafiya

Since the fall of communism the Russian Mafiya has been creating an international hue and cry with its involvement in contract killings, drug trafficking, sex trading, fraud, stolen cars and extortion among other things.[102] It is alleged to have within its control 80 percent of the Russian businesses including banks.[103] With a membership of over 300,000 worldwide it is fast becoming the greatest problem for law enforcement authorities.[104]

2.8.7 The Nigerians, Turkish Mafia and the Jamaican Yardies

The Nigerians on the other hand are specialists in the art of fraud, although they have recently been dabbling with drug trafficking and have been able to secure annually an estimated income of $US3.5 billion.[105] Other criminal organizations including the Turkish Mafia, the Hells Angels and the Jamaican Yardies, are thorns in the side of law enforcement officials. It is alleged that the Turkish Mafia contributes 80% of the heroin that is smuggled into the United Kingdom market each year.[106] They are also involved in the illegal smuggling of immigrants.[107] The Hells Angels biker group which originated in the USA has now spread its wings far a field to Scandinavian countries. The country that appears to be most badly affected by this group is Canada where it is involved in prostitution, drug trafficking, theft and extortion.[108]

2.8.8 Overarching reasons for organised crime

All of these organizations in addition to those aforementioned are very closely knit and are extremely loyal to their causes. It is this loyalty factor that would have been established amongst them through fear, kinship or blood ties that makes it sometimes virtually impossible and impregnable for the law enforcement authorities to penetrate,

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[102] Ibid at p. 20
[103] Jordan D., "Drug Politics Dirty Money and Democracies," 1999 at pp. 75 - 76 where it is noted that the mafias own and control most of the 1,800 banks in Russia: see also Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering" 2000, at p. 20
[104] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering" 2000, at p. 20
[105] Ibid at pp. 22-23
[106] Ibid at p. 22
[107] Ibid
[108] Ibid at p. 23

interdict, prosecute and incarcerate.[109] These strong ties may well have developed due to the need for the acquisition and accumulation of wealth, in addition to the other motivational factors such as culture, politics and religion. Suffice it to state however, that certain criminal acts are committed by those who are poverty stricken, blinded by cupidity, castrated by undue influence, obsessed with power, embittered as a result of religious and other political beliefs purged by acts of terrorism and the exponents of matters concerning foreign policy and international relations.

When considering the institution of measures against those criminals, law enforcement must look beyond the horizons of profits and zoom in on other principal reasons such as power and authority and terrorism so that the problem can be magnified, evaluated and surgically removed. Going easy on crime, complicity to crime, conspiring to commit a crime and collaborating with criminals in the furtherance of crime must be dealt with effectively if the anti-money laundering initiative is to gain efficacy. It is therefore necessary at this juncture to provide an overview of how history, politics, economics and culture have fuelled criminal conduct and how at times collaborative efforts of certain governments and government officials have elevated to the ranks of prison dons,[110] and prized leaders many of the perpetrators of organized criminal activities.

The overview that will be provided is very significant in order to show that the criminal activities that gave rise to the money laundering problem had actually been taking place outside of small island OFCs and to a large extent had been condoned by some OECD/FATF and other developed countries. Such support for organized criminal activities has resulted in the establishment of societies that have been fashioned off criminal activities. This has left a mind set in those societies that is geared towards the accumulation of wealth without regard to human life and suffering.[111] Consequently, there are countries in which prominent individuals may well be convinced that their survival, whether political or economic, depends on crime.[112] To turn a blind eye to such malaise and iniquity is furthering a socialization that regards evil as an acceptable way of life and murder as the norm in ensuring political and economic stability. The small island OFCs as will once again be demonstrated, are not responsible for such a

[109] Letizia P., "Criminal Fraternities or Criminal Enterprises?" in Williams P., & Vlassis D., "Combating Transnational Crime Concepts, Activities and Responses," 2001 at pp. 94-99
[110] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at p. 82 where it is stated that Pablo Escobar prison cell was luxurious.
[111] Varela-Cid E., "Hidden Fortunes, Drug Money, Cartels and the Elite Banks,", 1999 pp. 20-79
[112] Ibid at pp 23, 35 and 41

morose situation and therefore the direction of legislative efforts should reflect that position.

However, it is also recognized that in a globalised world the sins of one country are usually visited upon the next and therefore it will not augur well for the comity of nations if one country were to turn a blind eye to a global problem. How such a state of affairs originated and is allowed to continue ought to be examined within the historical, social, economic and political context. These factors of life must be put into their correct perspectives when considering the extent to which certain small island OFCs and SVG in particular, facilitate the money laundering process and therefore are alleged to be non-cooperative in the fight against money laundering activities. To commence this examination it is most instructive to be guided by the historical imperatives of criminal activities and money laundering.

2.9 Money laundering and the State

The depraved and heinous conduct in which many have engaged for increased wealth and ultimate power has existed for centuries. The extent to which such conduct has been prevalent has for the most part been dependent on the support and encouragement of heads of States, leaders and other important organs of the state. The Caribbean region at one time was the home for criminal activities that were encouraged by those countries whose economic interests may well have benefited tremendously.[113]

The involvement in or condonation of the State or State controlled institutions in undesirable acts have at times made a mockery of the investigative processes conducted by law enforcement agencies.[114] Such conduct has led Jeffrey Robinson in referring to money laundering to express the view that "Governments have been known to do it as well, whether to subvert terrorists or to arm freedom fighters."[115] For this reason it is imperative that attention is drawn to the involvement of the State in the money laundering process as a means of showing why unless drastic steps are taken to obviate

[113] UNODCCP "Financial Havens Banking Secrecy and Money Laundering" 1998, at p. 3

[114] Jordan D., "Drug Politics Dirty Money and Democracies," 1999, at pp. 68 & 97, where the CIA's involvement in the global heroin trade had frustrated the efforts of the Drug Enforcement Authority(DEA) of the USA; see also McCoy A., "The Politics of Heroin," Lawrence Hill Books, 1991 at pp. 469-470 where the CIA were found by the IRS to be laundering money through Castle Bank. The case had to be dropped because the CIA invoked national security.

[115] Robinson J., " The Laundrymen" Arcade, 1996 at p. 20

certain oppressive domestic and foreign policies in certain FATF countries in particular, there will always be difficulties suppressing money laundering activities.

The impact of globalisation has expedited the process giving rise to the retreat of the State[116] and the return of the undesirable activities which fashioned the emergence of the State in the first place.[117] It is this vicious cycle to which attention must be drawn in support of the argument that both the domestic and foreign policies of some, if not all of the FATF countries are responsible for the extent of the money laundering problem. Therefore, imposing stringent legal guidelines on small developing OFCs may only serve to increase crime in those centres and not necessarily combat money laundering effectively.

Accordingly, a brief historical overview of the emergence of the national State system and the significant role that was played by non-State actors in that regard is necessary to show the extent to which certain States for centuries have through violence and crime been able to secure economic prosperity for their peoples by pillaging and plundering and to use a more modern term laundering the spoils of other States.[118]

The emergence of the nation State system when considered in conjunction with legal anthropological theories serve to demonstrate the difficulties that are inherent in the institution and implementation of a regulatory framework that will effectively combat money laundering activities. Rebecca Redwood French referred to legal anthropology as *'the study of legal systems using methods and theory of cultural anthropology. It is centred in the analysis of law as a phenomenon inseparable from cultural context, the agent-actors, language, history and traditions of the society in which it operates.'*[119] This statement supports the perspective that unless the law is reflective of the cultural aspects of the society over which it is designed to govern, there will undoubtedly be difficulties in its acceptance and adherence.

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[116] Strange S., "Retreat of the State The Diffusion of Power in the World Economy" Cambridge, 2000 at pp. 110-121

[117] Thompson J., "Mercenaries Pirates and Sovereigns," Princeton University Press, 1996 at pp. 10-11

[118] UNODCCP "Financial Havens Banking Secrecy and Money Laundering" 1998, at p. 3

[119] French R., "Law and Anthropology" in Patterson D., "A Companion to Philosophy of Law and Legal Theory Blackwell Publishers 1999 at p. 397

For example, since as early as the thirteenth century there existed a culture of violence and crime in the furtherance of commercial supremacy and economic sustenance. [120] This culture of violence and crime in the forms of piracy,[121] privateering,[122] mercenarism[123] and mercantile companies[124] though on the surface may appear to have been eradicated or in some instances significantly mitigated, are nonetheless very much present in societies today. The only difference is that more sophisticated and ingenious ways have been developed to conceal and or disguise the identical conduct which was prevalent from the thirteenth century up to the nineteenth century[125]. As Janice E. Thompson pointed out, *"one reason for this turn to non-state violence was the ruler's lack of revenue. By authorizing individuals and groups to exercise political power and violence, rulers avoided the expense associated with some foreign ventures."*[126]

In most instances States turned a blind eye to those atrocities even after complaints were made by the recipient States. Accordingly, carte blanche was given to non-State actors to institute violence in the name of the State provided that some benefit accrued to the State as a result of such atrocities.[127] It was such a deplorable state of affairs that led the Spanish Ambassador to England to impress upon the King of Spain that he should issue orders;

> *"that no foreign ship should be spared in either the Spanish or Portuguese Indies but that every one should be sent to the bottom...This will be the only way to prevent the English or the French from going to those parts to plunder; for at present there is*

[120] Thompson J., "Mercenaries, Pirates and Sovereigns," 1996 at pp. 21-22

[121] Piracy consists in acts of violence done upon the ocean or unappropriated lands, or within the territory of a State through descent from the sea with a body of men acting independently of any politically organized society-see Stark F., 'The Abolition of Privateering and the Declaration of Paris." In Studies in History, Economics and Public Law, edited by the Faculty of Political Science of Columbia University, vol. 8, no 3. New York: 1897; For legal description of Piracy see Art 15 of the Convention on the High Seas of 1958.

[122] Vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which are permissible at sea by the usages of war. See Thompson J., "Mercenaries, Pirates and Sovereigns," 1996 at pp. 22-26

[123] A Mercenary is one who fights for an employer other than his home State and whose motivation is economic. The soldier of fortune is the ideal type of Mercenary. See Thompson J., "Mercenaries, Pirates and Sovereigns," 1996 at p. 26

[124] Mercantile Companies were based on a State granted monopoly on trade between the home country and regions outside of Europe. Though they were financed largely with private capital they were not private organizations in the modern sense. They possessed military, judicial and diplomatic power. For example, the charter of the United East India Company of the Netherlands granted it the power to make war, conclude treaties, acquire territories and build fortresses. These companies made treaties with each other and with foreign governments, governed subjects of their home states, raised armies and even coined their own money. See Mercenaries, Pirates and Sovereigns 1994 pgs 10-11

[125] Abhyankar J., "Maritime Fraud and Piracy" in Williams P., & Vlassis D., "Combating Transnational Crime, Concepts, Activities and Responses"' 2001 at pp. 157-194

[126] Thompson J., "Mercenaries, Pirates and Sovereigns," 1996 at p. 21

[127] Williams E., "From Columbus to Castro the History of the Caribbean 1492-1969" Andre Deutsch, 1997 at pp. 73-79 and 83-85; see also the Prize Act of 1708 which allowed a privateer to retain all his prizes and was paid a bounty based on the number of prisoners he took.

> *hardly an Englishman who is not talking of undertaking the voyage, so encouraged are they by Drake's return."*[128] As one 17th century writer in referring to pirates pointed out, *"they walk the streets with their pockets full of gold and are the constant companion of the chief in the government. They threaten my life and those who were active in apprehending them; carry their prohibited goods publicly in boats from one place to another for a market, threaten the lives of the King's collectors and with force and arms rescue the goods from them. All these parts swarm with pirates, so that if some speedy and effectual course be not taken the trade with America will be ruined."*[129]

Certain European States were able to enjoy the benefits of the unlawful acts of pirates, privateers, mercenaries and mercantile companies without having to accept the burdens. This approach was founded on the principle of plausible deniability.[130] Noblemen such as Sir Francis Drake, Sir John Hawkins, Sir Walter Raleigh and Sir Henry Morgan, all engaged in acts of piracy and privateering and insofar as Sir Henry Morgan was concerned in acts of buccaneering with the knowledge and approval of the rulers of Britain during the 17th and 18th centuries. The East and West India Mercantile Companies along with the Hudson Bay Mercantile Company[131] all played a significant role in the acquisition of land and wealth for the rulers of their respective countries. The Dutch also benefited tremendously from such nefarious activities especially in 1628 when Piet Heyn of Holland captured the Spanish treasure fleet off the coast of Cuba.[132] The French rulers also encouraged their nationals in acts of piracy and privateering. This was in evidence in 1522 when the King of France accepted presents of treasures which were stolen from Spanish vessels by a Florentine buccaneer Giovanni Verrazano.[133]

It is indeed interesting to note that those men stole, robbed, burgled and killed, yet some were granted knighthoods and permitted to exist as noblemen, except for Sir Walter Raleigh who was eventually executed in 1618.[134] Piet Heyn was also granted the award of being appointed Lieutenant-Admiral of Holland second only to the head of state, the Prince of Orange.[135] Even if one were to very quickly point out that the aforesaid

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[128] Ibid at p. 74

[129] Madinger J., & Zalophony S., "Money Laundering- A Guide for Criminal Investigators" CRC Press, New York, 1999 at p. 21

[130] Thompson J., "Mercenaries Pirates and Sovereigns," 1996 at p. 21 where Plausible Deniability was described as a situation in which a ruler of a state claimed the benefit of a private undertaking that was authorized by him. If however the enterprise caused conflict with another state, the said ruler could claim that it was a private operation for which he could not be held responsible.

[131] Ibid at pp. 32-42 and 59-68

[132] Williams E., "From Columbus to Castro the History of the Caribbean 1492-1969" 1997 at p. 84

[133] Ibid at p. 73

[134] Ibid at p. 79: See also Thompson J., "Mercenaries Pirates and Sovereigns," 1996 at p. 23

[135] Williams E., "From Columbus to Castro the History of the Caribbean 1492-1969" 1997 at p. 84

conduct was acceptable during those turbulent 300 years and that states and their agencies conducted themselves differently in modern times, the evidence to support such a contention will be extremely difficult to adduce. This is mainly because rulers of certain states have been found to be directly involved in decisions that encourage money laundering activities. It is reported that during Reagan's term in office as President of the USA he was aware of and did encourage a money laundering scheme which involved selling arms to Iran, the proceeds of which were then diverted to finance the Contra rebels of Nicaragua in their armed struggle against the Sandinista regime.[136]

Ferdinand and Emelda Marcos of the Philippines also allegedly laundered billions of dollars through a complex network of corporations world wide.[137] Manuel Antonio Noriega was involved in drug trafficking and money laundering.[138] Sadam Hussein has also been accused of laundering the proceeds of jewellery, expensive cars and other valuable items that were stolen from Kuwait.[139] During George Bush (Snr) term of office as President of the USA the CIA was actually selling cocaine in 1990 and laundering the proceeds only later to admit that the whole affair was regrettable.[140]

The CIA's further involvement in money laundering was conducted through Associated Traders Corporation, a company which was located in Baltimore Maryland. The CIA it is reported regularly laundered money through the First National Bank of Maryland.[141] In the late 1970s the CIA assisted the then Argentinean administration to launder money through Florida to assist a known associate of drug traffickers, General Luis Garcia Meza Tejada to launch a coup against the Bolivian regime.[142] It has also been reported that Joseph Mobutu of the Congo transferred up to $US5 billion from his country.[143]

There are countless other incidents of the CIA's involvement in money laundering and the same can be said of many other rulers and officials of countries[144] other than the USA. What is however alarming is the fact that the money laundering activities in

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[136] Robinson J., "The Laundrymen" 1996 at p. 20
[137] Robinson J., "The Laundrymen" 1996 at p. 22
[138] Ibid at pp. 67-69
[139] Ibid at pp. 61-65
[140] Ibid at p. 76
[141] Ibid at p. 77
[142] Ibid at p. 78
[143] Ibid at p. 31
[144] Morris-Cotterill N., "How not to be a Money Launderer," 1999 at p. 4 where it is alleged that Burma refuses to enact any anti-money legislation because its domestic economy would suffer if such laws are introduced :Lilley P., "Dirty Dealing-The Untold Truth About Global Money Laundering," 2000 at p. 5 – Where it is stated that Russian officials laundered state funds through offshore jurisdictions

which those persons and/or organizations are involved have served to exacerbate the money laundering problem not only by actually being engaged in it but also by condoning the activities of others, if to do so will further a preferred political purpose. The question that needs to be answered is whether these so called responsible persons institutions and States intend to cease such a deplorable practice? If not, how then can small island offshore finance centres make a difference when those who are charged with upholding the law are actually utilizing the secrecy provisions of offshore banking sectors[145] to carry out clandestine and unlawful acts. Thus it is clear from the foregoing that states emerged from a culture of violence and crime,[146] a culture that still exists today. The challenge is one to influence that culture if any meaningful progress is to be made in the current money laundering efforts.

2.10 Drug Trafficking and The State

One of the main reasons for the current thrust towards the eradication of money laundering is the evil attending drug trafficking which is considered to be the main illegal activity from which monies are earned and laundered. The continued success of drug trafficking has been highlighted by Richard Friman and Peter Andreas who expressed the view that;

> *"For example, while drug trafficking networks are certainly not a new phenomena, their scope, reach and intensity have greatly increased in recent decades. The illicit opium trade during the 1800s entailed the British and US traffickers shipping drugs from India and Persia respectively, into China. Illicit trade networks during the early 1900s included heroin and cocaine produced in the United States and Europe and transhipped through Japan and Russia into China. What has changed since the 1960s ... is the rise of the mass markets and sophisticated trafficking networks for heroin, cannabis, and cocaine in the United States and Europe."*[147]

It was mentioned earlier in this chapter that drug trafficking is the largest industry in the world today.[148] Research has revealed that approximately 90% of the cash circulating in London is tainted with drugs and 99% of that which is circulating in the USA is tainted with cocaine.[149] The annual drug trafficking revenues that are generated in the USA are estimated at $120 billion of which £20 billion relates to expenses.[150] It is further suggested that as much as $200 billion worth of illegal drugs enters the US market

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[145] Robinson J., "The Laundrymen" 1996 at p. 76
[146] Thompson J., "Mercenaries, Pirates, & Sovereigns" 1996 at p. 4
[147] Friman R., & Andreas P., "Illicit Global Economy & State Power," 1999 at p. 6
[148] Lilley P., "Dirty Dealing- The Untold Truth About Global Money Laundering" 2000, at p. 3
[149] Ibid at p. 26
[150] Howard C., "Butterworths Money Laundering Law," 2001 at p. 1/5

annually.[151] The United Kingdom (UK) is also reputed to be a lucrative market for illegal drug consumption. Since 1993 the UK's drug trafficking market was estimated to have generated approximately £2.4 billion per annum, of which 70% of the profits is said to be laundered in the UK financial institutions.[152] The extent of drug trafficking and laundering in the UK seems to confirm a remark which was made by John Moscow (a US Attorney) that;

> *"...too many British institutions turn a blind eye when there customers are laundering funds connected with drugs, terrorism and arms dealing...the City does not appear to accept the view that people who transmit money are responsible for their actions...as a result some New York launderers were choosing to route their 'dirty deals' through London"*[153]

Bearing in mind that offshore banks are condemned as being facilitators of money laundering the statement that *"the biggest offshore centre is actually the City of London"*[154] is not without foundation. But the drug trafficking problem does not only reside in the UK. The combined profits from drug trafficking in Europe and the USA are estimated to yield $232,115 per minute. This shows that the contribution of Europe and the USA to the $1 trillion in annual drug trafficking revenues[155] is significant.

Therefore, every effort must be made by the international community, especially the FATF countries and the USA in particular to rid the world of the drug menace. The question still remains whether enough is being done to significantly mitigate or eradicate drug trafficking. It may well be necessary to place greater emphasis on border controls to reduce the influx of illegal drugs. Perhaps there is a need for further research to be carried out on the possible implications of decriminalising certain classes of drugs. Moreover, an increased and relentless international campaign is necessary to educate consumers about the evils that are associated with drug consumption and the extent to which their contributions may be financing terrorists and other criminal activities. Whilst instituting measures to reduce the demand for illicit drugs more attention should be given to the reasons why people engage in the supply of illegal drugs. In this way assistance that will increase the opportunities for the relatively poor farmers can be much better targeted to enable them to diversify away from the production of illegal drugs. With other economic alternatives available there is always the possibility that

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[151] Ibid
[152] Ibid at p. 1/14
[153] Howard C., "Butterworths Money Laundering Law," 2001 at p. 1/5
[154] UNODCCP, "Financial Havens, Banking Secrecy and Money Laundering" 1998 at p. 16
[155] Howard C., "Butterworths Money Laundering Law," 2001 at p. 1/4

there will be a successful procession away from the production of illegal drugs. Such a success was experienced by the poor coca farmers of the Upper Huallaga Valley in Bolivia by using a method referred to as 'crop substitution.'[156] This is where the coca farmers substituted coca for another legally grown crop.[157]

If those alarming drug trafficking and money laundering statistics are to be taken as even closely representative of the actual drug problem it is difficult to conceive that such drug related activities can be conducted unabated without much success in apprehending those who are responsible. It is therefore important to examine the State and its agencies in order to determine the extent to which their activities are geared towards eradicating, encouraging and condoning the drug problem. Understandably, the extent to which the State is involved in the eradication process is significant in determining the extent to which any laws concerning money laundering can be effective.

Since it does appear that the introduction of money laundering legislation is not sufficiently adequate to obviate the drug problem, serious attention must be paid to the actual implementation of anti-drug legislation globally. It is only with the intransigent assistance of the State that an effective regulatory framework concerning drug trafficking and by extension money laundering can be properly instituted and administered. For this reason an appreciation of drug trafficking and the State is paramount in establishing the framework within which money laundering legislation can be crafted and implemented efficaciously. It is to such a relationship that consideration will now be given.

History has taught us about the evils of state involvement, encouragement or condonation of drug trafficking. It leads to nothing but reprisals and the consequences are usually disastrous. The British' direct involvement in the opium trade[158] resulted in two Opium Wars being fought between Britain and China in 1840 up to 1842 and 1858 up to 1860. Even after the use of opium had a significant debilitating effect on the Chinese population and the continued pleas by the emperor for a cessation of the opium trade, the British, determined to improve its balance of trade with China was relentless

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[156] Davids D., "Narco-Terrorism A United Strategy To Fight a Growing Terrorist Menace" Transnational Publishers Inc. 2002 at p. 51
[157] Ibid
[158] McCoy A., "The Politics of Heroin," 1991 at p. 4 - 5

and intransigent.[159] The trade in opium had a devastating effect on the Chinese population.[160] Britain however, was not the only country whose non-state actors engaged in the sale of opium to the Chinese, the Dutch, the Portuguese and the Americans did also play a significant role in one form or another.[161]

Having experienced first hand the dangers of opium consumption, the Chinese communist leader Mao Tse tung unleashed opium on the US military in the far East.[162] The Soviet Union also used drugs as a deliberate strategy to weaken the US forces during the Korean War.[163] Accordingly, the Soviet formed association with organized criminal groups in order to obtain assistance in the distribution of drugs and to acquire very valuable intelligence information.[164]

The French authorities and the CIA were aware of the trafficking of opium by Vietnamese government and French officials. It has been reported that the USA assisted in the marketing of the opium on behalf of anti-communists Vietnamese groups.[165] This historical experience did not however deter the Americans in any way. The Central Intelligence Agency (CIA) appears to be making it a habit to be associated with drug traffickers and undesirable characters, if to do so will further a political purpose consistent with the domestic and foreign policies of the USA. During a congressional hearing in June 1972 the US Inspector General retorted that, "the agency did not support drug trafficking as a matter of policy. The agency, however cooperated with drug trafficking for other purposes."[166] For the most part, the purpose is not usually achieved and if ever it has been achieved the detrimental effects of the CIA's[167] condonation of drug trafficking far outweigh any pleasure that the CIA can gain from its reckless conduct.

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[159] Morton S., "China its History and Culture," McGraw Hill, 3rd edn. 1995 at pp. 151-157: See also Welsh F., " A History Of Honk Kong," Harper-Collins Publishers, 1997 at pp. 33-37: Jordan D., "Drug Politics Dirty Money And Democracies," 1999 pp. 55-62

[160] Jordan D., "Drug Politics Dirty Money And Democracies," 1999 at p. 59

[161] Ibid at p. 244

[162] Jordan D., "Drug Politics Dirty Money And Democracies," 1999 at p. 63

[163] Ibid at p. 64

[164] Ibid at pp. 64-65

[165] Ibid at p. 65 – 66

[166] Ibid at p. 66

[167] McCoy A., "The Politics of Heroin," 1991 at p 491 -where the CIA provided National Chinese irregulars in Burma with the logistic support that was used to transform that country's shan states into the world's largest opium producer.

Take for example the fiasco in Afghanistan where the CIA turned a blind eye to drug trafficking by the Pakistani military. The vehicles that transported the arms for the Afghan guerrillas returned with cargoes of poppy seeds hidden among grains and other goods.[168] The CIA despite being aware of such deplorable conduct, did nothing to stop the magnitude of poppy being transported for further processing into heroin. As a result, during the 5 year period of the Afghan war against Russia it was reported that Pakistan's drug revenues totalled $US10 billion dollars. During that period "80 per cent of all heroin consumed in Britain and 30 per cent in the USA, came from Pakistan."[169] As a result of the CIA's condonation of the opium trade Pakistan became the supplier of 70 per cent of the world's heroin.[170] There was also a correlation between the quantity of the heroin which flooded the US market and the rise in drug related deaths by 77 per cent in 1979.[171]

As was mentioned earlier, the USA supported the Contras of Nicaragua against the Sandinista regime in the mid-1980s.[172] The Contras required funds to support its military campaign and in that regard established drug connections that extended to Panama, Costa Rica and Honduras.[173] It was these drug connections that the USA exploited to lend its support to the Contras. This support resulted in the major expansion of the cocaine trade passing through the Caribbean region during the height of the Contras military campaign.[174]

Having encouraged, supported, condoned and being at times directly involved in the drug trade, it seems rather duplicitous to now stand as the shining beacon for moral propriety. It is clear from the aforesaid, that the revenues from the drug trade are more significant than those of other illegal activities and therefore should be given much greater attention if the problem of money laundering is to be effectively addressed. The extent to which such attention will address the money laundering problem will be dependent on the support given by states and their law enforcement agencies. It is nonetheless extremely difficult to obliterate the money laundering problem when those who are charged with the responsibility for combating crime and those who have the

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168 Ibid at pp. 445-460
169 Jordan D., "Drug Politics Dirty Money And Democracies," 1999 at p. 66.
170 Ibid at p. 67
171 McCoy A., "The Politics of Heroin," 1991 at p. 437
172 Jordan D., "Drug Politics Dirty Money And Democracies," 1999 at p. 97.
173 Ibid at p. 67
174 Ibid at p. 68

resources to do battle with the criminals are essentially facilitating and perpetrating the underlying activities that give rise to money laundering.[175]

What is rather uncanny is that one of the largest consumers of illegal drugs is the USA market, yet there are countless reports of its complicity in drug trafficking. Even more alarming are reports that 16,000 US citizens die each year from illegal drugs and the country incurs a cost of approximately $US67 billion to deal with drug related illnesses, crimes and deaths.[176] It was David Jordan who quite rightly pointed out that; *"In short, it is clear that corruption infiltrates governments at the highest levels and that mafia cartels cooperate with each other much like States across international frontiers. Organised crime operates in terms of its own imperatives for economic expansion, for coalition building among its various national cartels, and enforcement of its interests. To flourish, it depends on government protection and opportunities provided by the globalisation of international capitalism."*[177]

2.11 Conclusion

Having reviewed the aforesaid, it is clear that the small island OFCs do not engage in the organized criminal activities that generate the substantial sums of monies that are being laundered each year. Neither are those phenomenal sums of monies earned within the jurisdictions of those offshore centres. The nefarious and deplorable criminal acts are therefore committed outside of those jurisdictions and the revenues earned from those acts are not generated within the small island OFCs. Therefore, the *placement* of the proceeds of crime is more likely to be made in the FATF countries where the illicit funds originate. That being the case, why should the FATF blacklist and condemn other countries as being uncooperative when it would appear that the money laundering problem commences and ends in its member countries?

Notwithstanding the foregoing, the roles that small island OFCs play in the money laundering process need to be closely examined since their liberal offshore finance laws and banking secrecy provisions have exposed them to abuse by organised criminals.

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175 Scott P., & Marshall J., "Cocaine Politics," University of California Press 1998 at p. 5 where it is stated that for the CIA to target international drug networks, it would have to dismantle prime sources of intelligence, political leverage, and indirect financing for third world operations.
176 Lilley P., "Dirty Money-The Untold Truth About Global Money Laundering," 2000 at p. 8
177 Jordan D., "Drug Politics Dirty Money And Democracies," 1999 at p. 98

Equally, there have been a number of drug trafficking, arms dealing[178] and money laundering[179] cases involving small island OFCs. It is therefore contended that OFCs have a responsibility to ensure that their regulatory and supervisory framework and their conduct in general, create an environment that is not favourable to money laundering activities. The categorisation by John Walker of three small island OFCs among the top twenty destinations for money laundering activities (see **Table 2** above) provides an indication of the likely level of tolerance for those activities. This tolerance level must however be mitigated but unless there is a much greater reduction of organised criminal and money laundering activities in the FATF member countries any attempts by small island OFCs to combat money laundering will be futile.

In so far as SVG is concerned, there has been a determined effort to prevent money laundering activities from being perpetrated within its shores. In that regard SVG passed a number of laws which facilitated the exchange of information with other countries and tightened up on its OFSS to prevent its abuse by organised criminals. It is to that regulatory framework that attention will be drawn with a view to ascertaining whether there was in place an effective regulatory and supervisory framework to combat international criminal and money laundering activities.

[178] Griffith I., "Narcotics Arms Trafficking, Corruption and Governance in the Caribbean," JMLC, 1997 Vol. 1 NO, 2 at pp.138-147

[179] UNODCCP, "Financial Havens, Banking Secrecy and Money Laundering" 1998 at pp. 34-46

Chapter 3. "The Supervisory and Regulatory Framework- Prior to the Blacklisting of SVG."

3.0 *Introduction*

This chapter will focus on the legislative framework that existed during the period (mid 2000) that the FATF conducted its review of SVG. It will be argued that SVG had demonstrated legislatively and by its conduct ordinarily that it was prepared to and was in fact cooperating internationally, in the fight against international crime. Moreover, it will also put into proper perspective the efforts that were made by SVG to meet its international obligations and to maintain a reputable financial services sector, with specific emphasis on the OFSS. Accordingly, it establishes the foundation for the other two chapters that follow by providing an overview of the legislation that was pertinent to the money laundering initiative. The following chapter will continue the discussion that is commenced in this chapter but it will be primarily examining the conclusions that were reached by the FATF, with a view to highlighting the deficiencies and fallacies of its assessment of the regulatory and supervisory framework of SVG. In chapter five an analysis will be conducted of the legislative measures that were taken by SVG in order to be removed from the blacklist on 19th June, 2003.[1] This analysis will seek to demonstrate that to the extent that the legislative modifications facilitated SVG's removal from the blacklist, it did not represent any significant departure from what existed prior to the blacklisting. It is anticipated that together, the three chapters would synthesize to; ***(a)*** provide a sufficiently comprehensive analysis of SVG's efforts to combat crime and in particular money laundering and; ***(b)*** demonstrate that had the FATF conducted a proper evaluation of the legislative framework relevant to its money laundering initiative the conclusions would have been more favourable to SVG. For this reason, certain legislative provisions which may not have been discussed in this chapter or which may not have been expounded with sufficient detail, will be more appropriately dealt with in the other two chapters.

3.1 *The Drug (Prevention Misuse) Act 1988*

SVG's intention to combat money laundering was originally reflected in the passage of the Drug (Prevention Misuse) Act (DPMA) 1988. Its provisions, by and large

[1] FATF Report, "Review to Identify Non-Cooperative Countries and Territories: Increasing The World-Wide Effectiveness of Anti-Money Laundering Measures," 2003.

conformed with the requirements of Articles 4[2] and 35[3] of the Single Convention on Narcotics Drugs 1961 which provided for the cooperation with other States in the fight against drug trafficking. Drugs money laundering was made a criminal offence pursuant to section 17(1) of the DPMA 1988.[4] That section criminalised any assistance given to a drug trafficker that enabled him to conceal, transfer or in any other way deal with the proceeds of his drug trafficking.[5] The Act went further to criminalise any assistance given to the commission of a drug related offence outside of SVG provided that there was a corresponding law[6] in place, in the other country that punished that offence.[7] Effectively, SVG was prepared to deal with the commission of a drug trafficking offence not only within its territorial borders but also without it as well. In doing so,

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[2] Article 4 of the Single Convention on Narcotic Drugs (520 UNTS 204, 1961) provided that: "*The parties shall take such legislative and administrative measures as may be necessary ; (a) to give effect to and carry out the provisions of this Convention within their own territories; (b) to cooperate with other States in the execution of the provisions of this convention...* "

[3] Article 35 of the Single Convention on Narcotic Drugs (520 UNTS 204, 1961) provided that: "*Having due regard to their constitutional legal and administrative systems, the parties shall;(a) make arrangements at the national level for the coordination of preventive and repressive action against the illicit traffic;...{of narcotic drugs]; (b) assist each other in the campaign against the illicit traffic in narcotic drugs; (c) co-operate closely with each other...with a view to maintaining a co-ordinated campaign against the illicit traffic; (d) ensure that international co-operation between the appropriate agencies can be conducted in an expeditious manner; and (e) ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the parties...* "

[4] Section 17(1) provides: "*If a person enters into, or is otherwise concerned in, an arrangement whereby-*

(a) the retention or control by or on behalf of another (call him "A") of the proceeds of drug trafficking by A is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) the proceeds of drug trafficking by A-

(i) are used to ensure that funds are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment or otherwise,

knowing or suspecting or having reasonable grounds to suspect that A is a person who carries on, or has carried on, drug trafficking, he is guilty of an offence.

Section 17(2) provides: "*In this section, references to the proceeds of drug trafficking by any person include a reference to any property which, directly or indirectly, represented in his hands the proceeds of drug trafficking by him.* "

[5] Regina v Iain Farquar MacMaster [1999] 1 CAR 402; [1999] Crim LR 310, where conceal or disguise may be taken to mean intention to hide proceeds of drug trafficking : Section 17 of the Drug (Prevention Misuse) Act 1998 is *pari materia* with the English Section 50 of the Drug Trafficking Act 1994

[6] Section 35(1) of the DPMA 1988 defines Corresponding Law in the following manner: " *In this Act the expression "corresponding law" means a law stated in a certificate purporting to be issued by or on behalf of the government of Saint Vincent and the Grenadines to be a law providing for the control and regulation in that country of the production, supply, use, export and import of drugs and other substances in accordance with the provisions of the Single Convention of Narcotic Drugs signed at New York on 30th March, 1961 or a law providing for the control and regulation in that country of the production, supply, use, export and import of dangerous or otherwise harmful drugs in pursuance of any treaty, convention or other agreement or arrangement to which the government of that country and the government of Saint Vincent and the Grenadines are for the time being parties.* "

Section 35(2) provides that: "*A statement in any such certificate as aforesaid to the effect that any facts constitute an offence against the law mentioned in the certificate shall be conclusive evidence of the matters stated.* "

[7] Section 21 of the DPMA 1988 provides that "*A person commits an offence if in Saint Vincent and the Grenadines he assists in or induces the commission in any place outside Saint Vincent and the Grenadines of an offence punishable under the provisions of a corresponding law in force in that place.* "

there was required to be some form of cooperation among countries to rid the world of the drug menace.[8] By criminalising drug money laundering in that way, and at that time, SVG was at the forefront in the fight against money laundering.

3.2 *The Vienna Convention*

In 1988 SVG signed the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention") and acceded to it on 17th May 1994. Interestingly, the DPMA 1988 came into force on 17th October, 1988, two months prior to SVG signing the Vienna Convention on 20th December, 1988. The Vienna Convention which entered into force on 11th November, 1990[9] sought to address the global problem of drug trafficking and initiated the novel idea of criminalising and confiscating the proceeds of drug trafficking.[10] The countries[11] that ratified the Vienna Convention were required to introduce legislation that made dealing with the proceeds of drug trafficking a criminal offence.[12] In this way it was hoped that by taking the profits out of crime, the incentive to traffic in narcotics and psychotropic substances would have been significantly removed, thus reducing the incidence of drug related crimes.[13]

3.3 *The Fugitive Offenders Act 1989*

Under Article 6 of the Vienna Convention parties are required to implement legislative and other measures that will ensure that the offences listed under Article 3, paragraph 1[14] were extraditable offences. Moreover, it imposed upon signatories an obligation to expedite extradition procedures that would easily facilitate the extradition of person or persons whose return was requested by another party. SVG heeded that call when on

[8] See Sections 21 and 35 of the DPMA, 1988.
[9] Gilmore W., "Dirty Money- The Evolution of Money Laundering Countermeasures," Council of Europe Publishing, 1999, p 50.
[10] Ibid p 51
[11] treaty@un.org The number of countries that ratified the Vienna Convention up to 3rd March 2004 was 173. The Congo was the country that ratified the Convention on that date.
[12] Article 3 of the Vienna Convention imposed on States that executed the convention a duty to introduce laws that criminalise a list of activities to do with drug trafficking, money laundering and the confiscation of the proceeds of drug trafficking. It provides that: *"Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: ..."* and went on to list activities that should be criminalise.
[13] Gilmore W., "Dirty Money- The Evolution of Money Laundering Countermeasures," (1999), p 51.
[14] See note 12 above

Chapter 3. "The Supervisory and Regulatory Framework- Prior to the Blacklisting of SVG."

29th December, 1989 the Fugitive Offenders Act (FOA) 1989[15] came into force. The FOA 1989 essentially provided for the extradition of a person who was accused of a relevant offence or who was unlawfully at large after the conviction of such an offence.[16] 'Relevant offence' was defined in the Act as one of the categories of offences that were listed in the First Schedule to the Act or an offence which if committed in another country would have been an offence when committed within SVG.[17]

Unlike the Vienna Convention where Article 6 required States to introduce legislation that will make drug related offences extraditable offences, the FOA provided a Schedule of offences which included drug related and a number of other offences that were relevant for the purposes of extradition. Although it did not list money laundering offences other than those that were drug related, the FOA nonetheless included an international dimension and was drafted to assist other countries to bring to justice those whom might have fled to SVG to escape the burdens of the law. Understandably, the non-inclusion of money laundering offences, apart from those that were drug related

[15] The FOA incorporated the Extradition Acts of 1870 to 1935 and the Fugitive Offenders Act of 1970. Section 31 provides that: (1) *"Notwithstanding the cesser of the application of the United Kingdom Acts known as the Extradition Acts 1870 to 1935, the Orders-in-Council made under the said Acts and specified in the second column of the Second Schedule made under the said Acts and applying the said Acts to the foreign countries specified in the first column of that schedule (which Orders have been applied to St. Vincent and the Grenadines and are so applied at the commencement of this Act) shall continue to apply unless and until provision is otherwise made by the order of the Governor General under Section 4(5).*

(2) Where before the 27th December, 1989, proceedings for the return of any person have been commenced under the provisions of the Fugitive Offenders Act, 1970, or the Extradition Acts of 1870 to 1935 and have not been concluded, such proceedings shall be deemed to have been commenced under the provisions of this Act and may be concluded hereunder.

(3) This Act applies to offences committed both before and after the commencement of this Act."

[16] Section 5 of the FOA 1989 provides that; *"Subject to the provisions of this Act, a person found in Saint Vincent and the Grenadines who is accused of a relevant offence in any country being-*
(a) a Commonwealth country
(b) the Republic of Ireland; or
(c) a foreign country to which this Act applies, or who is alleged to be unlawfully at large after conviction of such an offence in any such country, may be arrested and returned to that country as provided by this Act."

[17] Section 6 of the FOA 1989 provides that; *"(1) For the purposes of this Act, an offence of which a person is accused, or has been convicted, is a relevant offence if-*

(a) it is an offence against the law of that country which, however described in that law, falls within any of the descriptions set out in the First Schedule and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; and
(b) the act or omission constituting the offence or, the equivalent act or omission, would constitute an offence against the law of Saint Vincent and the Grenadines if took place therein, in the case of an extra-territorial offence, in corresponding circumstances outside Saint Vincent and the Grenadines.

(2) In determining for the purposes of this section whether an offence against the law of a country falls within a description set out in the First Schedule, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under that law shall be disregarded."
(3) References to the law of any country include references to the law of any part of that country."

could have been attributed to the fact that the Vienna Convention only dealt with drug related offences and did not address the wider money laundering issues.

3.4 *The Criminal Code- Chapter 124 of the 1990 Revised Laws of SVG*

Chapter 124 of the 1990 Revised Laws of SVG ("The Criminal Code") made provisions for the forfeiture of the proceeds of certain offences that were committed by persons who were employed in the public service. Section 32[18] empowers the court to recover from persons who are convicted of offences under sections 85,[19] 86[20] and 104[21] of the Criminal Code any property, which has passed in connection with any of those offences. Section 85 criminalised the corrupt solicitation or receipt of any property by a person employed by the public service for the purposes of discharging the duties of his office. It also criminalised any corrupt procurement or offer that is made by any person to an employee of the public service. Moreover, Section 86 makes it an offence for a person employed within the public service to accept for the performance of his duties any reward or a promise of any reward, except from his employers. Insofar as Section 104 is concerned, it is an offence to accept any consideration for the concealment of

[18] Section 32 of the Criminal Code 1988 (as amended) provides that: "*Where any person is convicted of an offence under section 85, 86 or 104, the court may, in addition to or in lieu of any other penalty which may be imposed, order the forfeiture to Crown of any property which has passed in connection with the commission of the offence or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property; and any such property or sum forfeited shall be dealt with as the Governor -General shall direct. Payment of any such sum ordered to be forfeited may be enforced in the same manner and subject to the same incidence as in the case of a fine, costs or compensation.*"

[19] Section 85 of the Criminal Code 1988 (as amended) provides that: "*Any person who-*

(a) *being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or*

(b) *corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon or for any person, employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of such act or omission on the part of the person so employed,*

is guilty of an offence and liable to imprisonment for three years."

[20] Section 86 of the Criminal Code 1988 (as amended) provides that: "*Any person who, being employed in the public service, takes or accepts from any person for the performance of his duty as such an officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of an offence and liable to imprisonment for three years.*"

[21] Section 104 of the Criminal Code 1988 (as amended) provides that: "*(1) Where any person has committed an offence, any other person who, knowing or believing that the offence or some other offence has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, asks for, accepts or agrees to accept for not disclosing that information, any consideration other than the making good of the loss or injury caused by the offence, or the making of reasonable compensation for the loss or injury, is guilty of an offence and liable to imprisonment for two years.*

(2) A person shall be deemed to conceal his knowledge of an offence if, without lawful excuse, he fails or refuses to disclose to proper authority all material facts known to him relative to that offence.

information that is material to the prosecution or conviction of an offender. By legislating in this way, SVG is restricting the incidence of any corrupt practices in the public service by not only criminalising those practices but also removing any benefits to be derived from such conduct. By virtue of Section 104, SVG seeks to deter the acceptance of monetary reward by any one in return for the suppression of information that is vital to the investigation process by law enforcement officials.

3.5 *The Caribbean Financial Action Task Force (CFATF)*

The Caribbean Financial Action Task Force (CFATF) was established following two meetings which were convened in Aruba and Jamaica in 1990 and 1992 respectively and attended by Caribbean countries (including SVG).[22] It was established to assist its member countries[23] to implement anti-money laundering measures in an effort to combat crime. Arising out of those two meetings were an additional 19 recommendations[24] that were considered to be appropriate to the circumstances of the member countries and complementary to the 40 FATF money laundering recommendations.[25] During the meeting in Jamaica, Caribbean and Latin American countries declared (the Kingston Declaration on Money laundering) that amongst other things, they would ratify the Vienna Convention and endorse and implement the 40 FATF recommendations and the 19 CFATF recommendations.[26] The member countries also agreed to subject themselves to a process of evaluation by their peers (officials from other member territories).[27] Accordingly, in May 1995 SVG voluntarily requested a mutual evaluation of its regulatory and supervisory framework. The CFATF's mutual evaluation was conducted during the period 20-24th October, 1997 and the draft report on the evaluation was completed on 10th July, 1998. The CFATF's report contained several observations about the domestic and offshore financial services sectors. Amongst those observations were several areas that the CFATF considered to be

[22] See www.cfatf.org
[23] There are 26 member territories which are; Antigua and Barbuda, Anguilla, Aruba, Barbados, The Bahamas, Bermuda, Belize, The British Virgin Islands, The Cayman Islands, Costa Rica, Dominica, Dominican Republic, Grenada, Republic of Haiti, Jamaica, Montserrat, The Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, The Turks and Caicos Islands, Trinidad and Tobago and Venezuela
[24] See www.cfatf.org
[25] Lambert A, "The Caribbean Anti-Money Laundering Programme," JMLC, 2001, Vol. 5, no. 2 at p 158
[26] See www.cfatf.org – Kingston Declaration on Money Laundering 1992, p 2 para 5
[27] Ibid p 3 para 8

deficient and warranted remedial attention. Accordingly, it made the following recommendations:[28]

(i) The need to introduce international insurance legislation;

(ii) The need for legislation and guidelines to combat money laundering;

(iii) The supervisory functions of the Authority should be administered by Public Officers;

(iv) More Staff should be recruited and trained;

(v) The need to establish a National Anti-Money Laundering Standing Committee comprising of Senior Government supervisory and enforcement agency officials;

(vi) The need to establish a Financial Intelligence Unit as a central authority for the receipt of large currency transaction and suspicious activity reports.

(vii) That International Business Companies (IBCs) and Mutual Funds should be required to submit their annual accounts to the Authority;

Prior to the blacklisting of SVG in June 2000 it had implemented all but two of the aforesaid CFATF's recommendations. SVG did not support the suggestion (in (iii) above) that only public officers should be members of the Board of Directors of the St. Vincent and the Grenadines Offshore Finance Authority ("OFA") and accordingly refused to accept that any such change was necessary (see the following chapter for further discussion). It also did not consider the mandatory requirement for the submission of annual returns by IBCs (see (vii) above) an advisable amendment to the International Business Companies legislation especially since other offshore jurisdictions did not make that requirement mandatory. SVG's membership of the CFATF, its voluntary request for a mutual evaluation and the implementation of the substantive recommendations of the CFATF were cogent indicators of its commitment to the eradication of crime in general and organised crime in particular.

3.6 *The Drug Trafficking Offences Act 1993*

In 1993 SVG passed the Drug Trafficking Offences Act (DTOA) and the Mutual Assistance in Criminal Matters (MACM) Act. Both Acts provided for international

[28] CFATF, "Mutual Evaluation Report St. Vincent and the Grenadines," July 1998 at pp 21-27

cooperation in the fight against global crime and with regard to the DTOA, emphasis was placed on the criminalisation of drug related money laundering. The DTOA 1993 retained the drug related offences that were provided in its predecessor, the DPMA 1988, but introduced an additional offence of concealing or transferring the proceeds of drug trafficking.[29] Whereas the DPMA 1988 is an Act which provided for the criminalisation of *'dangerous and otherwise harmful drugs and related matters,'*[30] the DTOA provided for *'the recovery of the proceeds of illicit drug trafficking and for matters connected therewith or incidental thereto.'*[31] Moreover, the DTOA also made provisions for the confiscation[32] of the proceeds of crime and the seizure and detention[33] and forfeiture[34] of cash.

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[29] Section 22(1) of the DTOA 1993 provides that: *"A person is guilty of an offence if he –*

(a) conceals or disguises property which is in whole or in part, directly or indirectly represents, his proceeds of drug trafficking; or

(b) converts or transfers such property or removes it from the jurisdiction,

to avoid prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order."

Section 22(2): *"A person is guilty of an offence if, knowing or having reasonable grounds to believe that property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he-*

(a) conceals or disguises the property; or

(b) converts or transfers the property or removes it from the jurisdiction, to assist a person to avoid prosecution for a drug trafficking offence or the making of a confiscation order."

Section 22(3) *"A person is guilty of an offence if, knowing or having reasonable grounds to believe that property is, or in whole or in part directly or indirectly represents, another persons proceeds of drug trafficking, he acquired the property for no consideration or for an inadequate consideration."*

[30] The title of the DPMA 1988.

[31] The title of the DTOA 1993

[32] Section 5 of the DTOA 1993-

(1) where a person appears before the court, having been remanded for sentence in respect of one or more drug trafficking offences of which he has been convicted a magistrate either by the court or by a magistrates court and has not previously been sentenced or otherwise dealt with in respect of any of those convictions, the court shall act in accordance with subsections (2), (4) and (5).

(2) The court shall first determine whether he has benefited from drug trafficking.

(3) For the purpose of this Act, a person who has at any time, whether before or after the date of commencement of this Act received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.

(4) The court determines that he has so benefited, it shall, before sentencing or otherwise dealing with him in respect of the offence, determine in accordance with section 9 the amount to be recovered by virtue of this section.

(5) The court shall then, in respect of that offence-

(a) order him to pay that amount ;

(b) take account of the order before-

(i) imposing any fine on him;

(ii) making any order involving any payment by him; or

(iii) making any order under section 28 of the Drugs (Prevention of Misuse) Act; and

(c) subject to paragraph (b), leave the order out of account in determining the appropriate sentence or other manner of dealing with the person against whom proceedings have been instituted for the drug trafficking offence.

[33] Section 25 (1) of the DTOA 1993- *"A customs officer or a member of the police may seize and, in accordance with this section, detain any cash which is being imported into or exported from this State if its amount is not less than ten thousand dollars and he has reasonable grounds for suspecting that it*

Law enforcement officials were also given additional powers to apply for and obtain restraining orders[35] to prohibit any dealing with property that may be the subject of a confiscation order.[36] Further, financial institutions were required to maintain and preserve proper financial records for a prescribed period of time (see chapter 4.7).[37] Essentially, the DTOA amplified the provisions of the DPMA. Moreover, it reiterated Article 4[38] of the Vienna Convention which dealt with the establishment of jurisdiction over drug related offences. It also implemented the recommendations made under Article 5, which emphasised the need for measures to confiscate the proceeds of drug related offences. Interestingly, during the year (1993) that the DTOA was passed in parliament, there were 407 reports of drug offences.[39] However, there are no records available which show the number of prosecutions and convictions, if any, that arose from those 407 reports which essentially represented 5.1 per cent of the total number of crimes that were reported for the year 1993. In effect, that level of drug crimes reports appears not to give any clear indication of the existence of a serious drug problem. Nonetheless, the Hon. Carlyle Dougan expressed some concern for the growing abuse of drugs in SVG when he expressly indicated that in the past:

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directly or indirectly represents any person's proceeds of, or is intended by any person for use in, drug trafficking."

[34] Section 26(1) of the DTOA 1993– *"The Magistrate may order the forfeiture of any cash which has been seized under section 25 if satisfied, on an application made by the Comptroller of Customs or member of the police force while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of, or is intended by any person for use in, drug trafficking."*

[35] Section 13(1) of the DTOA 1993 provides that; *"The Court may by order (hereinafter referred to in this section as a "restraint Order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order."*

[36] Section 5

[37] Section 30 of the DTOA 1993 provides that: *"(1) Subject to this section, and to section 31, a financial institution shall retain, in its original form for the minimum retention period applicable to the document,*

(a) a document that relates to a financial transaction carried out by the institution in its capacity as a financial institution..."

(2) For the purposes of section the expression "minimum retention period" means-

(a) where the document relates to the opening of an account with the institution, the period of 7 years after the day on which the account closed;

(b) where the document relates to the opening by a person of a deposit box held by the institution, the period of 7 years after the day on which the deposit box ceases to be used by the person; and

(c) in any other case, the period of 7 years after the day on which the transaction takes place..."

[38] Article 4 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which provides: "*Each party:*

(a) shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with Article, paragraph 1, when:

(i) The offence is committed in its territory;

(ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;

(b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1..."

[39] Crime Statistics Report for the Period1990- 2002- The Royal St. Vincent and the Grenadines Police Force.

> *"...when you heard of drugs here it might have just been in transit – in and out; maybe marijuana. Now, we are speaking about the effect on our youth of the abuse of drugs... We have to call on all the people, all the parents, all the sons and daughters, everybody in every part of this society, the churchmen, the preachers; we have to fight it, we have to fight it at the source now before it is too late. It has gotten out of hand in the United States- there the demand is great for it."*[40]

He also appeared to be concern that drug traffickers were acquiring arms with the proceeds of drug money when he stated that: *"They are buying guns with the drug money...if we are not careful, you know, we cannot walk the streets of this country safely... It is a good thing that the vast majority of Vincentian peoples are honest and law biding peoples."*[41]

Although those statements represented expressions of concern about the evils of drug trafficking, they did not appear to go as far as to conclude that there was a serious drug problem in SVG. They merely highlighted the need for urgent attention to prevent the prevalence of drug trafficking from gaining a foot hold in SVG. Accordingly, it seems appropriate to suggest that rather than being a measure to deal solely with a problem that existed locally, the DTOA was indeed another effort by SVG to cooperate internationally in the war against organised crime. That suggestion which will be borne out in this and the following chapters was also evident in the presentation of the Drug Trafficking Offences Bill 1993 when the Attorney General Hon. Parnel Campbell stated that:

> *"The objects of this are to update legislation in St. Vincent and the Grenadines for the suppression of drug trafficking offences and to enable the Government to adhere to the United Nations Convention signed at Vienna in 1988, directed against such traffic."*[42]

3.7 *The Mutual Assistance in Criminal Matters Act 1993*

The MACM Act 1993 dealt specifically with providing assistance in criminal matters to Commonwealth States.[43] In essence, it was largely the implementation of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth.[44] The MACM Act 1993 also made provisions to provide assistance in criminal matters to States that were not part of the Commonwealth of Nations.[45] SVG's continued efforts to

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[40] St. Vincent and the Grenadines Parliamentary Debates 12th December, 1993, at p 33.
[41] Ibid
[42] Ibid at p 26
[43] Section 5(1)
[44] Mc Clean D., "International Co-operation In Civil and Criminal Matters," Oxford, 2002 at pp. 197-213
[45] Section 5(1) of the Mutual Assistance in Criminal Matters Act *"Subject to subsection (2), this Act other than Part IV, shall apply in relation to all Commonwealth Countries."* Part IV applies to countries other than the Commonwealth.

introduce measures that would, through international cooperation, effectively combat drug trafficking and other related offences, were demonstrated in its efforts to implement the recommendations of the Vienna Convention. This was illustrated by the remarks of the Attorney General during the parliamentary debate on the MACM Bill when he stated that:

> *"This Bill is the sister Bill to the one [meaning the Drug Trafficking Offences Bill] we have just passed. It is sought to be passed in conformity with our obligations under the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, for under that Convention, which we have now adopted, we are obliged to adopt domestic legislation (my emphasis added)."* [46]

The MACM Act 1993 fundamentally established SVG's position on international crime and international cooperation. SVG was prepared to provide assistance in criminal matters to Commonwealth countries and other countries with which it subsequently executed relevant agreements.[47] The types of assistance in criminal matters include amongst other things ***(a)*** the provision of any article or thing that would be relevant to a criminal proceeding;[48] ***(b)*** making arrangements for the attendance of persons to give assistance or other evidence relevant to any criminal proceedings;[49] ***(c)*** identifying and locating persons that would provide assistance relevant to a criminal proceeding;[50] ***(d)*** the arrangement or the transfer of any prisoner who could provide or give evidence and assistance relevant to a criminal proceeding;[51] ***(e)*** tracing property that is connected with a serious offence[52] and; ***(f)*** the making and enforcement of confiscation and restraining orders.[53] The MACM Act 1993 provided for a comprehensively wide range of circumstances in which SVG could provide and receive assistance where the requesting State had reasonable grounds to believe that the assistance required was relevant to the criminal proceeding.

What was (and still is) of primary significance about the MACM Act 1993 was its apparent primacy over all other legislation which sought or may seek to restrict its application to cooperate internationally by providing assistance in criminal matters. This was reflected in Section 37 of the MACM Act wherein it was provided that;

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[46] St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993 at p 40
[47] Sections 6 and 30
[48] Section 9
[49] Section 10
[50] Section 8
[51] Section 11
[52] Section 15
[53] Section 16

"The provisions of this Act shall take effect notwithstanding any provision of any other Act to the contrary, to the intent, that any such provision of any other Act shall be deemed to have been hereby amended to the extent required to ensure compliance with the relevant provisions of this Act."[54]

Nevertheless, it encouraged other forms of assistance and cooperation between SVG and another State or law enforcement institution. By providing that;

"Nothing in this Act derogates from, or prevents the development of cooperation (whether formal or informal) in respect of criminal matters, between this State and any Commonwealth country, or between this State, or any organisation in this State, and the International Criminal Police Organisation or any other organisation."[55]

Another important feature of the MACM Act 1993 was the clarity accorded to the provisions in the First and Second Schedules to the Act that outlined the procedure that should be followed in requesting and providing assistance or refusing the assistance requested. Having already taken measures to implement Articles 3, 4, 5 and 6 of the Vienna Convention, the MACM Act 1993 essentially established the legislative framework, as required under Article 7,[56] to cooperate with Commonwealth and other States in the fight against drug related and other criminal offences.[57]

3.8 *The Drug Eradication Programme*

SVG continued to demonstrate an unwavering commitment to fighting crime by cooperating with the United States of America (USA) which provided military helicopters to burn marijuana fields in SVG under the Drug Eradication Programme. In referring to the drug situation in SVG, Hymie Rubenstein observed in the early 1990s that:

"Marijuana-ganja- and cocaine are still relatively new to St. Vincent and the Grenadines, the latter not arriving until the mid-1980s. The plant has been taken up with such vigour that St. Vincent now produces more ganja than any of the other small States of the region, a fact reinforced by the US-Vincentian sweeps of the Soufriere region on their continuing marijuana eradication deployments. Estimating that about 10% of the crop is destroyed, Rubenstein projects the annual sales of Vincentian ganja

[54] Section 37
[55] Section 6
[56] Article 7 of the Vienna Convention which provides: *"The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 3, paragraph 1."*
[57] St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993 at p 44 in referring to the Mutual Assistance in Criminal Matters Bill stated that: *"This legislation is necessary in the international cooperation against crime, particularly crimes involving money laundering and drug trafficking."*

> *at about US$40 million, several millions more than the value of the national banana exports."*[58]

But note that the CIA fact file on SVG has stated that only small amounts of cannabis is grown in SVG.[59] Although there have been lamentations about the status of drug trafficking in SVG, the number of reported drug offences relative to the total number of crimes that were reported in SVG between 1993 and 2002 hovers around an average of 5.3%.[60] This seems rather low when consideration is given to the extent of the speculation about drug trafficking. During the period 1993 to 2002 the highest number of drug offences reported was 528 in 1997 and the lowest was 345 in 1998.[61] In spite of the fact that drug trafficking money laundering was introduced by the DPMA 1988[62] and amplified by the DTOA 1993,[63] during the House of Parliament debate on the Proceeds of Crime Bill 1997, the former and longest serving Attorney General retorted that:

> *"So many of them **[drug offenders]** are not afraid of the normal penal sanctions that you have now, but they bound to get afraid when you have a law that said, following that conviction, the authorities can now look at all the property you have and see if they can prove that some or all of that property was derived from criminal activity. That is what the drug pushers are afraid of. I am stressing drug pushers because in St. Vincent and the Grenadines, money laundering as far as I am aware is not something that is known to authorities in any major or significant way, or as one person said 'who will come to St. Vincent to launder money?' I am not saying there isn't any of it, but I have yet to hear of somebody being charged for money laundering. It is an exceedingly difficult offence to prove. You need technical expertise of the highest kind and you need to be able to go from jurisdiction to jurisdiction to get the sort of evidence that will enable you to successfully prosecute money launderers (my emphasis added)."*[64]

Despite the fact that arising out of that statement was a recognition of the need for international cooperation in the fight against money laundering, it was nonetheless surprising, having regard to the mountain of speculation about the preponderance of drug activity,[65] that no one (including a Vincentian) had ever been convicted of a money laundering offence. Moreover, it seemed rather strange that the Attorney General who presented both the DPM Bill 1988 and the DTO Bill 1993 to the House of Parliament

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[58] Brana-Shute G., "Narco Criminality in the Caribbean" in Griffiths I., "The Political Economy of Drugs in the Caribbean," Macmillan Press Ltd., 2000, at p 100
[59] www.cia.gov/publications/factbook/geos/vc.html
[60] Crime Statistics Report for the Period 1990- 2002- The Royal St. Vincent and the Grenadines Police Force.
[61] Ibid
[62] Section 17
[63] Sections 21 and 22
[64] St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997, at pp 54 - 55
[65] See, St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993, at pp 31-38: Griffith's I, "The Political Economy of Drugs in the Caribbean," Macmillan Press Ltd. 2000, at pp. 100-102

on the basis of that statement ignored the fact that the DPMA 1988[66] and the DTOA 1993 contained drug money laundering[67] and confiscation[68] provisions. Similarly, the MACM Act 1993 had provided a comprehensive legislative regime for assistance in criminal matters.

3.9 *Maritime Counter Drug Operations (The Ship Rider Agreement) 1995*

The Ship Rider Agreement was also another important effort between SVG and the USA to combat illicit maritime drug trafficking.[69] The Agreement essentially, permitted the Coast Guards of the parties to the Agreement, to board and search in SVG's waters[70] with the authorisation[71] and in some cases without the authorisation of either party, vessels, cargo and persons that either party reasonably suspected were engaging in illicit drug trafficking.[72] This Agreement was considered to be vital to the drug interdiction programme of the USA in its efforts to significantly mitigate or if possible eradicate the movement of illegal drugs originating from Latin America and which were being

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[66] Section 17 of the DPMA 1988

[67] Sections 21 and 22 of the DTOA 1993

[68] Section 5 of the DTOA 1993

[69] Article 1 of the Ship Rider Agreement 1995 provides that; *"The parties shall cooperate in combating illicit maritime drug traffic to the fullest extent possible, consistent with available law enforcement resources and related priorities."*

[70] Article 3(a) defines St. Vincent and the Grenadines waters as *"the territorial sea and internal waters of St. Vincent and the Grenadines, and the air space over such waters."*

[71] Article 7 provides that; *"When a shiprider is embarked on the other party's vessel, and the enforcement action carried out is pursuant to the shiprider's authority, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement whether or not involving weapons, shall be carried out by the shiprider except as follows;*

(a) *crew members of the other party's vessel may assist in any such action if expressly requested to do so by the shiprider and only to the extent and in the manner requested. Such request may only be made, agreed to and acted upon in accordance with the applicable laws and policies of both parties; and*
(b) *such crew members may use force in self-defence in accordance with the applicable laws and policies of their government."*

[72] Article 8 *"The government of the United States of America shall not conduct counter-drug operations in Vincentian waters without the permission of St. Vincent and the Grenadines, granted by this agreement or otherwise. This agreement constitutes permission by the government of St. Vincent and the Grenadines forUnited States counter-drug operations in any of the following circumstances:*

(a) *an embarked St. Vincent and the Grenadines shiprider so authorises;*
(b) *A suspect vessel or aircraft, encountered seaward of the territorial sea of St. Vincent and the Grenadines flees into Vincentian waters and is pursued therein by a U.S vessel without a St. Vincent and the Grenadines shiprider embarked, in which case any suspect vessel may be boarded and searched, and, if the evidence warrants, detained pending deposition instructions from St. Vincent and the Grenadines authorities; and*
(c) *A St. Vincent and the Grenadines shiprider is unavailable to embark on a U.S vessel may enter Vincentian waters in order to investigate any suspect aircraft or board and search any suspect vessel other than a St. Vincent and the Grenadines flag vessel, and, if the evidence warrants, detain any such vessel pending disposition instructions from St. Vincent and the Grenadines authorities."*

transhipped to the USA and European markets through Caribbean Islands.[73] Together with the Drug Eradication Programme, the Ship Rider Agreement provided the cooperation that the USA badly needed to combat the drug related crimes from which substantial revenues were generated in its lucrative drug market.[74]

The extent of SVG's cooperation in the fight against drug trafficking was reflected in the remarks of the former Attorney General and Deputy Prime Minister P.R Campbell, who stated in March 1995 that *'short of handing St. Vincent and the Grenadines over to the Americans to administer, I do not know what else the government of St. Vincent and the Grenadines could lawfully do to combat drugs.'*[75] This sentiment was also echoed a year and a half later by the former Prime Minister, Sir James Mitchell who retorted that, *'we have surrendered our sovereignty. We're giving the US all the cooperation in the world – what else do they want us to do?'*[76] Arising out of those statements was the presumption that there was nothing else that SVG could have done to assist the US in its dug interdiction and enforcement efforts. The Ship Rider Agreement was seen as a substantial surrender of one country's sovereignty to another. As Lowe has observed;

> *"It is unusual, but not unknown, for one State to give another permission to exercise enforcement jurisdiction in its territory. Perhaps the most significant agreements of this kind in recent years are the so-called 'ship rider' agreements made, for example, by the United States with a number of Caribbean States, under which US Navy vessels may in certain circumstances enter the territorial seas of the other party in order to pursue and arrest vessels suspected of being engaged in the illicit traffic in narcotic drugs."*[77]

3.10 *The 1996 Extradition Treaty between SVG and the USA*

The FOA 1989 specifically applied to Commonwealth States and The Republic of Ireland. It however included certain foreign countries which were listed under the Second Schedule and which were held over from the periods prior to October 1979 when SVG gained its independence from the United Kingdom. The FOA incorporated certain provisions of previous legislation such as the Fugitive Offenders Act 1970 and

[73] Griffith's I., "The Political Economy of Drugs in the Caribbean," 2000, at p 72 *where it is stated that the US officials believe that 20% of the 760 tonnes of cocaine annually produced in South America is transhipped to the United States through the Caribbean basin." European officials suspect that close to 30% of the cocaine smuggled from Latin America to Europe passes through the Caribbean as well*

[74] Lilley P., "Dirty Dealing-The Untold Truth About Global Money Laundering, International Crime and Terrorism," Kogan Page, 2003 at p 30 where the revenues from the sale of illicit drugs in the USA was estimated in 1997 by the Office of Drug Control Policy to be $57.3 billion annually and that 90% of the bank notes that circulate in the USA are contaminated by narcotics.

[75] Munroe T., "Cooperation and Conflict in the US- Caribbean Drug Connection" in Griffith's I., "The Political Economy of Drugs in the Caribbean," 2000, at p 194

[76] Ibid

[77] Lowe V., "Jurisdiction," in Evans M., "International Law," Oxford, 2003, at p. 352

the Extradition Acts 1870 to 1935.[78] Accordingly, it also incorporated the Statutory Instruments from 1894 to 1976 by which those countries under the Second Schedule became parties to the extradition arrangements.[79] FATF members were also included in the Second Schedule. The USA was incorporated by a Statutory Instrument in 1976 but decided nonetheless to establish an Extradition Treaty with SVG in 1996.[80] The Treaty was actually executed on 15th August, 1996.

Under the Extradition Treaty 1996 the USA and SVG agreed to extradite to each other, persons who are wanted in either State for prosecution on extraditable offences or who have been convicted of an extraditable offence.[81] Article 2(1) of the Treaty defines an extraditable offence to be one that is punishable by imprisonment by either party to the Treaty for a period in excess of one year. What is most interesting about the Treaty is that it further prescribed that an extraditable offence is one which not only includes money laundering[82] but also one which, '*...consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of, or being an accessory before or after the fact to any offence described in paragraph 1.*'[83]

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[78] Section 31 of the FOA 1989 provided as follows; "*Notwithstanding the cesser of application of the United Kingdom Acts known as the Extradition Acts 1870 to 1935, the Orders-in-Council made under the said Acts to the foreign countries specified in the second column of the Second Schedule made under the said Acts and applying the said Acts to the foreign countries specified in the first column of that Schedule (which Orders have been applied to St. Vincent and the Grenadines and are so applied at the commencement of this Act) shall continue to apply unless and until provision is otherwise made by order of the Governor General under section 4(5) or by treaty or otherwise.*

[79] Section 4(2) of the FOA 1989 provided that; "*Subject to the provisions of subsection (2) to (5), this Act applies to –*

- *(a) every foreign country specified in the Second Schedule;*
- *(b) every foreign country with whom St. Vincent and the Grenadines has concluded an extradition treaty after 27th October, 1979;*
- *(c) every foreign country who is a party to a multinational international convention to which St. Vincent and the Grenadines is a party;*

Provided that this Act only applies to a country to which subparagraph © relates in respect of offences to which such conventions relates, unless the provisions of subparagraphs (a) or (b) apply to such country."

[80] Section 4(4) of the Fugitive Offenders Act 1989 which provides that; "*If this Act applies to a foreign country specified in the Second Schedule before the concluding of an Extradition Treaty between St. Vincent and the Grenadines and that country and the treaty affects or amends an earlier extradition treaty with that country which extended to St. Vincent and the Grenadines at the commencement of this Act , then this Act shall apply thereafter in relation to such foreign country subject to that earlier extradition treaty as modified by the later treaty.*"

[81] Article 1 of the Extradition Treaty 1996 provides that; "*The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons sought for prosecution or convicted of an extraditable offence by the authorities in the Requesting State.*"

[82] Section 17 of the DPMA 1988; and Sections 21 and 22 of the DTOA 1993 are punishable under Section 22(6) for periods in excess of one year. Similarly Sections 59, 60, 61 of the PCA 1997.

[83] Article 2 (2) of the Extradition Treaty 1996 provides that; "*An offence shall also be an extraditable offence if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of, or being an accessory before or after the fact to, any offence described in paragraph 1.*"

The First Schedule of the FOA 1989 did not include inchoate offences.[84] Therefore, the Treaty effectively extended the number and types of extraditable offences that were listed under the FOA 1989 which was drafted with sufficient flexibility to include such offences on a case by case basis.[85] Moreover, by including inchoate offences as extraditable offences, the Treaty has improved the chances of bringing to justice those who may not have actually engaged in the physical acts that constituted the crime but were insidiously lurking in the shadows as the masterminds or the financiers of criminal activities. The Extradition Treaty 1996 is yet another demonstration by SVG of its willingness to cooperate in the suppression of international crime.

3.11 *The Offshore Finance Legislation*

In 1996 SVG carried out a complete overhaul of the OFSS by the introduction of seven new pieces of legislation[86] which revolutionised the regulatory and supervisory framework of the sector. Prior to the introduction of the legislation the OFSS was governed by two Acts of Parliament. These were The St. Vincent and the Grenadines Trust Authority ('The Trust Authority') Act[87] and the International Companies Act 1976(which was repealed and replaced by the International Companies Act (ICA) 1982).[88] The Trust Authority Act which became effective on 31st December, 1976 essentially established the St. Vincent and the Grenadines Trust Authority (hereinafter

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[84] Simester A., & Sullivan G., "Criminal Law Theory and Doctrine," Hart Publishing, 2000 at p 257 where it was stated that; *"The offences of incitement, conspiracy, and attempt are known as inchoate offences because liability for these crimes may arise before, or indeed without, the commission of any principal offence...The obvious virtue of inchoate offences is that they permit the lawful restraint and arrest of aspirant criminals prior to the realisation of any concrete harm."*

[85] Section 4(3) of the FOA, 1989

[86] The legislation included; The St. Vincent and the Grenadines Offshore Finance Authority Act 1996, the Registered Agents and Trustee Licensing Act 1996, The International Business Companies Act 1996, The International Trust Act 1996, The International Banks Act 1996, The International Insurance Act 1996 and the Confidential Relationships Preservation (International Finance) Act 1996: There were also Regulations accompanying the Acts. These were; The Registered Agents and Trustee Licensing Regulations 1996, The International Business Companies Regulation 1996, The International Trust Regulations 1996 and The International Banks Regulation 1996. No Regulations for the Regulations of International Insurance were made.

[87] Chapter 114 of the 1990 Revised Laws of St. Vincent and the Grenadines. This Chapter was however, repealed by Section 11(1) of the SVGOFA Act 1996 which stated that. *"The Trust Authority Act, and every rule and regulation promulgated there under, is repealed in its entirety as of the effective date of this Act, and save only to the extent any such law, rule or regulation shall expressly remain applicable to a trust registered there under but continued for the period of time set forth in the International Trusts Act."*

[88] Chapter 104 of the 1990 Revised Laws of St. Vincent and the Grenadines. Chapter 104 was however, repealed by Section 112(1) of the International Business Companies Act (IBC)1996 which provided that,
"The ICs Act, Cap 104, as amended is hereby repealed."

referred to as the "Trust Authority")[89] and provided for the registration of international trusts.[90] The ICA on the other hand became effective on 20th April, 1982.[91] It provided for the registration and regulation of ICs[92] which included international banking companies[93] and international insurance companies[94] as well. Where appropriate, comparisons will be made, between the two former offshore Acts and the six new pieces of offshore legislation, in an effort to show the steps that were being taken by the government to combat money laundering activities.

3.11.1 *The St. Vincent and the Grenadines Offshore Finance Authority Act 1996*[95]

The St. Vincent and the Grenadines Offshore Finance Authority Act (SVGOFA) 1996 established the Offshore Finance Authority ("OFA")[96] for the purposes of administering, marketing, regulating and supervising the conduct of offshore business in the country.[97] Section 11 of the SVGOFA repealed the Trust Authority Act 1976. Accordingly, all applications for offshore entities[98] and to become offshore representatives[99] are required to be submitted to the OFA for registration and licensing. The OFA is the first regulatory body that was established for the purposes of administering, licensing and regulating the OFSS in St. Vincent and the Grenadines.

Under the Trust Authority Act local representatives[100] submitted their applications for the registrations of trusts[101] and ICs[102] to the Trust Authority, which in turn submitted those applications to the Registrar of Trusts[103] and the Registrar of Companies[104] for

[89] Section 3
[90] Section 6
[91] Note that the ICs Act 1982, replaced the ICs Act 1976.
[92] Section 4 of the ICs Act 1982
[93] Sections 4-15
[94] Section 3(4)
[95] This Act was passed in the House of Parliament on 27th June, 1996 and was given the Governor General's assent on 7th October, 1996.
[96] Section 3
[97] Section 8
[98] For example, International Business Companies, International Trusts, International Banks and later Mutual Funds and International Insurance Companies.
[99] See Section 2 RATL Act 1996 where Offshore Representation is defined. Effectively an offshore representative is some one permitted by the Offshore Finance Authority to conduct offshore business.
[100] Section 2 provides that : *Local Representative means the Authority and any other person residing in St. Vincent and the Grenadines by whom an international company is represented for the purposes of the ICs Act.*
[101] Section 6
[102] Section 12
[103] Section 6(1)(a)
[104] Section 12(1)(a)

registration. The Registrar of Trusts and the Registrar of Companies were civil servants who were employed at the government's local Registry Department. Therefore, the Trust Authority's role was that of an intermediary in the process of trusts and ICs' registrations. Its regulatory functions were dichotomous. On the one hand it received and submitted applications for the registrations of trusts and companies and on the other, it shared with the Registrar of Companies the supervisory functions for the operations of international banking companies.

What was even more interesting about the functions of the Trust Authority was the hybridity of its role both as a local representative[105] and a regulator[106] of international banking companies. Such hybridism could have created difficulties in the regulatory process if the situation had arisen where the Trust Authority acted in the capacity as local representative for an international company in possession of an international banking license. Attempts were however made within the provisions of the ICA for the Registrar of Companies[107] and the Attorney General[108] to supervise the conduct of the Authority whenever such a necessity arose. This did not however remove the anomalous character of the Trust Authority due to the fact that the law created the situation where it was permitted to be judge and jury in its own case and this did not augur well for the transparency and proper administration of the OFSS.

This anomaly was however removed by Section 8 of the St. Vincent and the Grenadines Offshore Finance Authority Act 1996 which bestowed upon the OFA the duty, ultimate authority and exclusive right amongst other things to, administer, license and supervise, Registered Agents[109] and International Banks and supervise the activities of the Registrar of Trusts and the Registrar of Companies. Whereas in the past the Trust Authority which was a body corporate, shared the regulatory responsibilities for ICs and international trusts with the Registrar of Companies and the Registrar of Trusts who were civil servants, those responsibilities are now solely within the province of the OFA. Effectively, an OFSS regulatory and supervisory regime has been created which

[105] The definition of local representative also includes the Trust Authority.
[106] The following sections contained regulatory powers of the Authority: Sections 6, 8, 9,10(1), 15, 24 of the ICs Act 1982.
[107] Section 12 of the ICA 1982 (now repealed)
[108] Section 31 of the ICA 1982 (now repealed)
[109] Registered Agents are persons who are licensed by the Offshore Finance Authority to conduct the business of offshore representation.

is separate and distinct from the regulatory and supervisory requirements of the domestic finance sector.

Moreover, unlike the Trust Authority Act which permitted the Trust Authority to function as a local representative, the SVGOFA 1996 did not retain that provision and therefore the OFA currently exists as a regulatory and administrative body. Instead, the Registered Agents and Trustees Licensing Act 1996 which was passed by the House of Parliament on 27th June, 1996 and to which the Governor General granted his assent on 7th October, 1996 established a separate regulatory regime for those persons wishing to provide offshore finance services.

Under the St. Vincent and the Grenadines Trust Authority Act 1976 and the ICA the Trust Authority was granted a wide discretion to determine those who it was satisfied should be allowed to function as local representatives. In accordance with Section 2 of the ICA[110] the Trust Authority need only be satisfied that the person:

> *"...is a resident of St. Vincent and the Grenadines and possesses a qualification and status satisfactory in the opinion of the Authority to ensure proper and efficient representation of the international company concerned..."*

It appeared that no application to become a local representative was required to be made to the Trust Authority and no guidance was given as to the type of qualification and the extent and type of experience that a local representative should possess. Therefore in the absence of an application procedure there was no effective process for excluding those persons who were to become local representatives.

3.11.2 *The Registered Agents and Trustee Licensing Act 1996*

The main purpose of the Registered Agents and Trustee Licensing ('RATL') Act 1996 is to regulate the conduct of those persons wishing to engage in the business of offshore representation in order to ensure that efficient and effective services are provided to offshore clients by reputable and competent persons.[111] This is exemplified by its rigorous licensing procedure,[112] the stringent duties[113] that are imposed on licensees and

[110] See also Section 2 St. Vincent and the Grenadines Trust Authority Act 1976
[111] Lewis L., "A Revolution in Representation," Offshore Investment, October 1998, Issue 90, pp. 27-30 at p. 27
[112] See the First Schedule to the RATL Act 1996: See also Sections 4, 5, 6, 7, 11 and 16 of that Act.
[113] See Sections 12, 14, 13, 17, 18 and 19

the likely penalties for misconduct[114] and consequences of non-compliance.[115] The provisions of the RATL Act 1996 clearly emphasised the government's intention to provide not only exemplary offshore financial services but to protect the interest of investors as well. In this regarded and in reference to the RATL Act it was stated that:

> *"Understandably, it is vital to ensure that only reputable and capable persons are engaged in the business of offshore representation. In the light of the fact that only registered agents are permitted to submit applications for offshore facilities (e.g. registration of trusts, companies, banks etc) every effort is made by the OFA in its supervisory capacity to ensure that the interests of investors are protected and preserved."*[116]

3.11.3 *The Companies Legislation*

3.11.3.1 *The ICs Act*

The ICA 1982 provided for the formation, registration and regulation of ICs. Section 2 defined international company in the following manner:

> *"international company means a company incorporated as an international company or international insurance company or international banking company or an international shipping company and includes a superannuation fund to which the provisions of this Act are applicable."*

The ICA primarily provided for the registration of companies and the licensing of international banks. There were however no provisions for the regulation of the conduct of shipping or insurance operations except for those which were incorporated into the ICA pursuant to the Statutory Rules and Orders 29 of 1978, which outlined the procedure by which an international shipping company may apply for the registration of a ship owned by the company. Insofar as international banking was concerned the provisions of the ICA did not provide a coherent regulatory structure and was deficient in terms of its supervisory and licensing capacities.

Under the ICA, The Trust Authority was required to share regulatory powers with the Governor General,[117] the Minister,[118] the Registrar of Companies[119] and the Attorney

[114] Section 24
[115] Sections 8 and 9.
[116] Lewis L., "A Revolution in Representation," Offshore Investment, October 1998, Issue 90, pp. 27-30 at p. 28
[117] Section 5 (1), (8), (9)(e)
[118] Section 6 (1)
[119] Section 4 (4), 11, 12, 23 (3), and 25

General.[120] However, pursuant to Section 24 the Trust Authority was empowered to assess, examine and investigate the operations of any registered international company.[121] But on the basis of the definition of local representative[122], it was also required to assess, examine and investigate itself. This was indeed an anomaly in the law and as stated above, a mischief which the very Act attempted to avoid by granting to the Attorney General supervisory powers to assess, examine or investigate the conduct of the Trust Authority when it was acting as local or resident representative.[123]

Moreover, the Trust Authority could have been placed in the embarrassing position of being a local representative for an international company that held itself out as an international banking company when in fact that was not the case. Such a company would have contravened section 5(6) of the ICA 1982 and therefore the Trust Authority would have been guilty of an offence pursuant to section 5(7) of the ICA for which there were penalties. The ICA imposed upon the Trust Authority a number of responsibilities and duties[124] concerning the regulation and supervision of ICs, all of which also applied to the Trust Authority itself in its capacity as local representative. Effectively, the provisions of The ICA echoed the famous maxim *"putting the rat to watch the cheese."* With the advent of the six new pieces of legislation the government was able to remove those anomalies and create a more efficient "one stop shop" operation with all applications for offshore entities being submitted to one body, the OFA.

3.11.3.2 *The International Business Companies Act 1996*

The International Business Companies (IBC) Act 1996[125] has made numerous radical and fundamental changes to the requirements that were laid down in its predecessor, the ICA 1982. It maintained the tax exemption incentive[126] but extended the statutory provisions to include the protection of the interests of shareholders[127] and certain

[120] Section 31
[121] ICs Act 1982 or Chapter 104 of the 1990 Revised Laws of St. Vincent and the Grenadines.
[122] Section 2
[123] Section 31 of the International Companies Act 1982 (now repealed)
[124] Sections 4 (2) and (5), 5 (1), (6), (7), (8), (10), (16), 6 (1), (2), (3), (4) 8, 9, 10, 15, 26, 27, 29, 30
[125] see website www.stvincentoffshore.com for the entire International Business Companies Act 1996 which was granted assent on 7th October, 1996.
[126] Section 99 of the IBC Act 1996
[127] Sections 46-61 of the IBC Act 1996

creditors and the management[128] and dissolution of companies.[129] Many of those changes were intended to reform the regulatory character of the business of international company registration and regulation in keeping with the government's thrust towards building a hygienic offshore finance sector. For example, the IBC Act provides that no individual of an unsound mind, less than eighteen years of age and who possesses the status of a bankrupt will be permitted to form or join in the formation of an international business company (IBC).[130] The ICA 1982 did not provide for such a restriction and it was therefore possible for a bankrupt, a minor or a certified mentally ill individual to participate in the formation of an IBC. This situation was untenable and had the potential to generate issues relating to an individual's legal capacity to function on behalf of and in the interest of the IBC. Moreover, the absence of such a provision in the ICA 1982 actually encouraged an individual to defraud creditors and other investors, declare himself bankrupt and use the funds that he had defrauded to start afresh under the guise of an IBC.

What is also of significance is the new provision under the IBC Act 1996 whereby any one can inspect the register of an IBC provided that a proper purpose was shown for the inspection.[131] Moreover, the IBC Act authorises the Registrar of Companies to issue a certificate of good standing, which amongst other things, must show whether the IBC is in the process of being wound up or any proceedings have been issued to strike the name of the IBC off the register.[132] The requirement can provide some protection to persons who intend to engage in any business transaction with an IBC and want to find out more information about the financial status of the company. On applying to the Registrar of Companies for a certificate of good standing the Registrar is expected to have sufficient information about the solvency[133] of the IBC before a certificate of good standing can be issued.

Moreover, under the IBC Act a company may elect to submit to the Registrar of Companies its registers of directors, shares and mortgages or charges or any document

[128] Sections 28-45 of the IBC Act 1996
[129] Sections 76-81 of the IBC Act 1996
[130] Section 3 of the IBC Act 1996
[131] Sections 106 of the IBC Act 1996
[132] Section 105 of the IBC Act 1996
[133] It is submitted that although the Act does not require an IBC to submit to the Registrar of Companies annual returns it is difficult to see how a certificate of good standing could be issued without a review being conducted of the financial statement of the IBC to ascertain if it is solvent.

creating any encumbrances over some or all of its assets.[134] In this way any person wishing to transact business with the company or law enforcement officials could have inspected its register[135] at the office of the company's registry to ascertain very pertinent information about the company. However, the mere fact that the requirement to submit the information was voluntary and not mandatory reduced the level of transparency that may well be warranted in the circumstances. Nonetheless, the movement towards greater transparency has made it much more difficult for criminal elements to function since they rather exist in a shroud of secrecy, whereas the honest investor prefers to ascertain more information about a business transaction before committing himself. The absence of any credible information on the register, although admittedly may frustrate the efforts of law enforcement officials, it may also have the virtue of restricting the effective conduct of business activities since it may arouse unwanted suspicion.

The IBC Act 1996 like the ICA 1982 did not severely restrict the type of activities in which IBCs can engage. Therefore, an IBC, just like its predecessor, the international company, could have been used to conduct insurance and other type of investment activities.[136] Although the IBC Act 1996 restricted the use of certain names by IBCs,[137] it did not extend any restrictions to the activities in which the IBC was able to participate. For example, although an IBC was prohibited from using the words insurance or assurance in its name[138] an IBC could have conducted insurance and mutual fund activities without violating the IBC Act.[139]

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[134] Section 115

[135] Section 106

[136] Note under Section 5(6) of the ICs Act 1982 and Section 3(1)of the International Banks Act 1996 an IBC was prohibited from doing banking business without an international banking license.

[137] Section 10(2)(b) of the IBA 1996

[138] Ibid

[139] St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 70 (as per Hon. Stanley K. John); *"Up to 1996, the situation was that offshore ICs could have included in their objects, he conduct of the business of insurance without obtaining from any regulatory authority in St. Vincent a license to do so. An IBC could not include banking in business, in its objects because our laws provided that if you wanted to do banking business you must obtain a licence to do banking business, protect your depositors, protect St. Vincent and the Grenadines and make sure that you conduct your affairs satisfactory to certain minimal requirements, but in relation to insurance there was no such measure. It means therefore then that an American could have come down to St. Vincent or fax information down to St. Vincent, incorporate an IBC which takes a matter of hours, put in its objects insurance business then go back to the United States, Europe or Canada and elsewhere and start doing business as an insurer."*

3.11.4 *The International Insurance Acts of 1996 and 1998*

There was an International Insurance Act that was passed in the House of Parliament on 19th September, 1996. It was not however implemented due to the lack of clarity in its provisions[140] and its omission to exclude international insurance companies from conducting insurance business in the domestic sector.[141] In the absence of a functioning international insurance legislation, ICs and IBCs that were registered under the ICA 1982 and IBC 1996 respectively were conducting business as insurance companies even though their activities were not regulated. This was an unacceptable state of affairs for SVG but it nonetheless took two years before any remedial action was taken. This action resulted in the enactment of the International Insurance Bill in the House of Parliament on 24th September, 1998. This Bill was considered to be a welcoming relief by parliamentarians who were understandably uncomfortable with the situation where ICs conducted insurance business without any form of regulation. In that regard the Hon. Stanley K. John said:

> *"So we were effectively letting loose criminals and unsuspecting people who wanted insurance desperately because there is a big market out there(this offshore insurance business). So that the introduction now of the regulatory regime that we have in this particular measure [**meaning the International Insurance Bill 1998**] can only go towards protecting, unsuspecting or desperate potential clients and victims out there and safeguarding our good name as an offshore financial services provider and the good name of St. Vincent and the Grenadines as a country (my emphasis added)."*[142]

The International Insurance Act (IIA) 1998 is described in its preamble as *"An ACT to amend and restate the International Insurance Act 1996."* It essentially repealed the International Insurance Act 1996 in its entirety, due to the substantial amendments and by virtue of the fact that it was introduced to parliament as a completely new Bill. The IIA 1998 prohibits the conduct of international insurance business by those ICs and IBCs that do not possess an international insurance license[143] and made it an offence for non-compliance.[144] It introduced five different classes of insurance licenses.[145] Classes I[146] and II[147] are permitted to conduct any international insurance business and general

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[140] St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 75 (as per Dr. Hon. Ralph Gonsalves an opposition member who supported the International Insurance Bill)
[141] St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 63
[142] St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 71
[143] Section 11(1) of the IIA 1998
[144] Section 11(2) of the IIA 1998
[145] Under Section 4(1) of the IIA 1996 there were three classes of Insurers license.
[146] Section 12(1)(a) of the IIA 1998

international insurance[148] business respectively. Class III[149] on the other hand established a hybrid structure wherein it was permitted to conduct with its owners and affiliates 70% of its insurance business as long term[150] and general international insurance business and the remaining 30% with other persons. A Class III international insurance license was essentially 70% captive. The other two classes (Classes IV and V)[151] of insurances were also captive insurances[152] and therefore did not require the same extensive regulatory framework as Classes I, II and III. In this regard Hon. Arnhim Eustace pointed out that;

> *"...the licenses for class one to three are subjected to a much greater scope of regulation. This is so because those classes of licence will be selling policies to the general public; but with respect to classes four and five Mr. Speaker, they are captive*

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[147] Section 12(1)(b) of the IIA 1998

[148] Section 4 of the IIA 1998 defines 'general international Insurance business' to mean; *"international insurance business other than long term international insurance business, and for the removal of doubt includes –*

(a) credit life business, that is the business of effecting and carrying out contracts of insurance against risk of loss to persons arising from the non-payment of debts due to such persons by reason of the death of their debtors, being contracts that are –
  - *(i) not contracts of domestic insurance business,*
  - *(ii) expressed to be in effect for a period of eight years or less, and*
  - *(iii) not either automatically renewable or convertible into contracts of insurance of any other kind or for any other different period; and*

(b) employee group business, that is the business of effecting and carrying out contracts of insurance on the lives of employees of the insured or of an affiliate of the insured, being contracts that are –
  - *(i) not contracts of domestic insurance business,*
  - *(ii) expressed to be in effect for a period of eight years or less,*
  - *(iii) not either automatically renewable or convertible into contracts of insurance of any other kind or for any other different period; and*
  - *(iv) made on a group basis;"*

[149] Section 12(1)© of the IIA 1998

[150] Section 4 of the IIA 1998 defines 'long term international Insurance business' to mean; *"international insurance business of any of the following kinds which is not general international insurance business, namely –*

(a) effecting and carrying out contracts of international insurance on human live or contracts to pay annuities on human life;

(b) effecting and carrying out contracts of international insurance against risks of the person insured-
  - *(i) sustaining injury as a result of an accident or of an accident of a specified class; or*
  - *(ii) dying as the result of an accident or of an accident of a specified class; or*
  - *(iii) becoming incapacitated or dying in consequence of disease or diseases of a specified class; or*

(c) effecting and carrying out contracts of international insurance, whether by the issue of policies, bonds, endowment certificates or otherwise, whereby in return for one or more premiums paid to the insurer a sum or series of sums is to become payable in the future to the persons insured, not being contracts otherwise falling within either paragraph (a) or (b);

being contracts that are expressed to be in effect for a period of more than five years or without limit of time and either not expressed to be terminable by the insurer before the expiration of five years from the effective date thereof are expressed to be so terminable before the expiration of that period only in special circumstances therein mentioned;

[151] Sections 12(1)(d) and (e) of the IIA Act 1998

[152] A captive insurance is described as an insurer that conducts insurance business with its owners.

> *insurance which do not sell to the public at large, but rather sell or insures the risk of the owners of the insurer or affiliates of the insurer."*[153]

He further referred to the significance of the distinction between the classes of insurance licence within the context of the time period in which companies that were conducting insurance business without an international insurance license should comply with the licensing requirements under the IIA 1998. Accordingly he stated that;

> *"...there are some one hundred and fifty companies already registered which are involved in the insurance business, and the transitional provisions*[154] *of the Act provide for the conversion by those companies within a specified period of time with special attention being paid to the fact that those which are dealing with the public will have a shorter time to meet the transitional provisions in classes four and five which are not selling to the public."*[155]

Nonetheless, all Classes of licenses are required to at all times maintain the required minimum margin of solvency prescribed by the Regulations.[156] Regulation 7 of the International Insurance Regulations (IIR) 1999 defines minimum margin of solvency as *'the minimum amount by which the total value of an insurer's allowable assets must exceed the total value of its liabilities.'* The minimum margin of solvency establishes a financial benchmark below which an insurer is not required to go if it wishes to maintain its license.

Moreover, the IIA 1998 introduced provisions to protect the interests of the insured and effectively regulate the conduct of intermediaries, (e.g. insurance brokers, insurance managers and insurance agents) and the international insurance business in the OFSS. It has set out to do so by legislating that only suitable persons[157] should be permitted to function as licensed intermediaries.[158] It has also imposed on those persons, a legal obligation to report to the Commissioner of Insurance, any knowledge or information that they may have that the insurer is not conducting its insurance business activities in the interests of the insured[159] or in accordance with the IIA 1998[160] and the criminal laws of any country or jurisdiction.[161] The IIA 1998 by prohibiting the intermediary from being a shareholder, officer, employee or in any other similar way connected to the

[153] See, St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998, at p 63
[154] Section 49 of the IIA 1998
[155] See, St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 64
[156] Section 17 of the IIA 1998
[157] Section 33(1) of the IIA 1998.
[158] Section 30 of the IIA 1998.
[159] Sections 36(1)(a), (c) and (d)of the IIA 1998.
[160] Section 36(1)(b) and (f) of the IIA 1998.
[161] Section 36(1)(f) of the IIA 1998.

insurer, has sought to ensure that there is no conflict of interest between the intermediary and the insurer and that the intermediary is not unduly compromised.[162]

Further operating and reporting requirements have been imposed on insurers; ***(a)*** not to stray from the particulars in their application in the conduct of their insurance businesses;[163] ***(b)*** to seek the approval of the Commissioner of Insurance before effecting any change in the nature of their insurance businesses for which Classes I, II and III licenses are held[164] and; ***(c)*** to prepare annual audited accounts[165] which shall be submitted to the Commissioner along with other returns.[166] The auditor is also required to report to the Commissioner his findings as to whether the insurer, either is experiencing, or may experience any difficulties meeting its financial commitments, the financial requirements of the Act or Regulations or that he no longer holds the position as auditor of the insurer.[167] Under the IIA 1998 reporting requirements are not merely restricted to intermediaries and auditors. The Commissioner of Insurance also has a responsibility not only to keep registers of the particulars of insurers and intermediaries[168] but also to submit a report to the OFA about the state of affairs of the overall insurance business in the OFSS.[169] To assist him in his supervisory responsibilities and to ensure that the interest of the insured and the reputation of the OFSS are preserved and maintained, provisions are also made for the Commissioner to gain access to the books and records of the insurer or an intermediary.[170]

The IIA 1998 was championed in the House of Parliament as a Bill that did, *"...not expose us unduly as a nation, while at the same time trying to meet that delicate balance between marketing and the legal requirements which is a critical problem in dealing with all the offshore legislation in this House."*[171] SVG clearly did not want its OFSS to be abused by criminal elements and the IIA 1998 bears ample testimony to that fact. The IIA 1998 by its provisions seeks to ensure that only persons with a sound financial background, the requisite knowledge and a good reputation were permitted, not only to be international insurers but also to conduct business as intermediaries. Together with the IIA

[162] Section 35 of the IIA 1998
[163] Section 22 (3) of the IIA 1998
[164] Sections 22(4) and (5) of the IIA 1998
[165] Section 22(6) of the IIA 1998
[166] Section 24 of the IIA 1998
[167] Section 40(1) of the IIA 1998
[168] Section 9 of the IIA 1998
[169] Section 8 of the IIA 1998
[170] Section 7 of the IIA 1998
[171] See, St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 64

Regulations 1999 (see next chapter), the IIA 1998 has effectively established the legal framework that will deter criminals from seriously contemplating turning to the OFSS as an aid to their felicitous schemes. During the parliamentary debate on the International Insurance Bill 1998 the Hon. Stanley K. John in a succinct manner emphasised the need to maintain a reputable OFSS when he stated that:

> *"We need to put foremost in our minds the safeguarding or protection of the interests of the people who are being insured. That the legislation must of necessity ensure that ... the policy holders who are taking advantage of the products offered from St. Vincent and the Grenadines ... are protected. We need to safeguard at the same time the reputation of St. Vincent and the Grenadines as a financial services sector, not just our financial services sector but St. Vincent and the Grenadines itself. In our debate on the Mutual Funds Act, I made reference to the widespread incidence of fraud that is pervasive in international financial circles and certainly in relation to the use of offshore financial services facilities in different countries."*[172]

Subsequent to the introduction of the IIA 1998, and up to September 2003 there were only 3 international insurance licenses issued by the OFA.[173] It therefore raises the question as to why over 150 companies conducted insurance business prior to the IIA 1998 but only three[174] were licensed by the OFA five years later.

3.11.5 *The International Banks Act 1996*

The International Banks Act (IBA) 1996 was another welcomed addition to the regulatory framework of the OFSS. Previously, the ICA 1982 regulated the conduct of international banking companies.[175] There were no Regulations providing guidance on the activities of an international banking company or the process of applying for a banking license. An application for an international banking license along with the particulars as stipulated in the ICA [176]was submitted through the Trust Authority to the Governor General for his approval or refusal. The Authority informed the applicant of the status of his application[177] but the ICA was silent as to who had the responsibility of issuing the license.[178] Moreover, both the Governor General[179] and the Minister of

[172] See, St. Vincent and the Grenadines Parliamentary Debate 24th September, 1998 at p 66
[173] Insurance Registry at the St. Vincent and the Grenadines Offshore Finance Authority.
[174] See www.stvincentoffshore.com/offshore_indus.htm.
[175] Section 5 of the IBA 1996
[176] Ibid
[177] Section 10 of the ICA 1982
[178] Records at the Offshore finance Authority showed that the Minister of Finance issued the international banking license.
[179] Section 5(8) of the ICA 1982.

Finance[180] possessed the power to revoke an international banking license whereas the Trust Authority had the authority to suspend a licensee on the advice of the Minister of Finance.[181] Under the IBA 1996 the OFA pursuant to Section 18 may with the advice of the Minister of Finance take certain measures, which also include the revocation of an international banking license.

The International Banks Act 1996 provided greater clarity in the licensing process.[182] Under that Act, an application for an international banking license was submitted to the OFA[183] which recommended to the Minister of Finance that the license should be approved. Having received the Minister's approval in writing the license was issued to the Applicant by the OFA.[184] There was no requirement under the ICA to submit the names of shareholders along with the application for a license.[185] This was a very crucial omission. In the absence of such information the door was opened for criminals to enter the OFSS and acquire an international banking license without the Trust Authority and the Minister of Finance being aware of the ownership of the international banking company. Furthermore, no provision was made for the supervision of the banking activities and apart from the submission of the annual audited financial statements,[186] the Trust Authority had no further access to the records or activities of the international banking company. Under the IBA 1996[187] and the International Banks Regulation (IBR) 1996,[188] the names and addresses of the shareholders must be submitted along with the application and there are provisions for the regulation and supervision of banking activities.[189] Essentially, the OFA is authorised by the IBA 1996 to request information from a licensee and to have access to its books and records (see chapter 4.5).[190]

[180] Section 6(1) of the ICA 1982
[181] Section 6(2) of the ICA 1982
[182] The International Banks Regulation 1996 provide forms and further guidance as to what is required to be submitted with the application.
[183] Section 4(2) of the IBA 1996
[184] Section 4(4) of the IBA 1996
[185] Section 5(2) of the ICA 1982
[186] Section 8 of the ICA 1982
[187] Section 4(2) of the IBA 1996 in particular see the Schedule to the Act
[188] See the Second Schedule
[189] Section 13 of the IBA 1996
[190] Section 13(2) of the IBA 1996

3.11.6 *The International Trusts Act(ITA) 1996*

Under the St. Vincent and the Grenadines Trust Authority Act 1976 provisions were made for the registration of trusts[191] but there were no provisions which defined an international trust or regulated the concept of a trust and its functions. The concept of a trust, its role and functions were all left to the principles of common law to determine. The International Trust Act (ITA)1996[192] has however not only provided a definition of trust[193] and an international trust,[194] by the definitions it has also outlined the characteristics of a trust. Under the Trust Authority Act the only qualifications that were necessary for a trust to be registered were that (a) the beneficiaries of the trust must not include persons resident in St. Vincent and the Grenadines at the time of the application[195] and (b) the trust may only be registered if at least one of the trustees is the Trust Authority or a suitably qualified person who is resident in SVG.[196]

Under the ITA both qualifications were retained but were extended to include the characteristics of an international trust.[197] There were additional requirements to be satisfied such as the formal requirements for the creation of a trust, which the ITA provides must be by deed or settlement, the contents of which must not purport to do anything contrary to the laws of the state.[198] Moreover, the ITA imposed upon a Registered Trustee the obligation of ascertaining that the settlor was solvent at the time of the settlement of the trust; that the settlor did not become insolvent as a result of the settlement or any subsequent disposition to the trust; and that none of the said transfers were made with the principal intention to defraud a creditor.[199] The fact that those provisions were not included in the Trust Authority Act exposed the OFSS to infiltration by undesirable persons. Now that the ITA 1996 has made it more difficult for such persons to register international trusts, it therefore represents another serious step towards the prevention of crime.

[191] Sections 6, 8, 9, 10, 14, 15, 16 and 17 of the St. Vincent and the Grenadines Trust Act 1976
[192] see www.stvincentoffshore.com for the International Trust Act 1996 and other offshore legislation
[193] Section 4 of the ITA 1996
[194] Section 2 of the ITA 1996
[195] Section 9(1)
[196] Section 9 (2)
[197] Section 56(1) of the ITA 1996
[198] Section 6 of the ITA 1996
[199] Section 56(1) of the ITA 1996

Chapter 3. "The Supervisory and Regulatory Framework- Prior to the Blacklisting of SVG."

One of the main purposes of Trust Authority Act was to make provisions for the registration of certain trusts on payment of specified fees in lieu of income tax.[200] Insofar as the registration of trusts is concerned the Act exempted registered trusts from income tax if distributions of the trust funds were only made to beneficiaries who were neither resident nor domiciled in St. Vincent and the Grenadines.[201] The ITA 1996 has maintained that exemption[202] but has also extended the tax exemptions to include inheritance tax, excise tax, stamp duty and capital gains tax[203] provided certain requirements are met.[204] The extension of the tax exemptions although they may have provided a potent marketing tool for the OFSS and incentive for prospective investors may well have contributed largely to SVG being categorised as a harmful tax jurisdiction.

The International Trusts Act 1996 provides for the registration and regulation of international trusts. In effect it codified many of the common law trust principles relating to the creation[205] and types of trusts,[206] the operations of a trust and the termination[207] and breach[208] of a trust. The major and significant departures from the provisions of the Trust Authority Act 1976 have been indicative of the intention by the government of St. Vincent and the Grenadines to introduce transparency into the offshore finance sector and prohibit undesirable investors from participating in the opportunities that are available. Such intention is reflected in the provisions that do not validate a disposition of property by a settlor to a trust where that property is not owned by the settlor at the time of the disposition.[209] Additionally, it does not validate a disposition of immovable property that is invalid under the law of the situs of the property[210] or validate testamentary trusts or dispositions that are invalid under the law of the testator's domicile.[211] In this way the ITA 1996 is giving recognition to the laws of a foreign jurisdiction. This is borne out by Section 32(2) which provides that:

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[200] The preamble of the Trust Authority Act 1976 states that it is an *"Act to establish the St. Vincent and the Grenadines Trust Authority: to make provision for the registration of certain trusts on payment of specified fees in lieu of income tax, and for the purposes connected therewith are incidental thereto."*
[201] Section 10 of the Trust Authority Act 1976
[202] Section 62(1) of the ITA 1996
[203] Section 62 (4) of the ITA 1996
[204] Section 62(1) of the ITA 1996
[205] Section 30
[206] Sections 10, 11, 12
[207] Section 18-21
[208] Section 22-27
[209] Section 32(1)(i)
[210] Section 32(1)(e)
[211] Section 32(1)(f)

> *"The recognition of any foreign law in determining whether the Settlor was the owner of the property referred to in this Part or the holder of property so referred to before or at the time of disposition is not affected by this Part."*

Further recognition is provided under section 34 (1) which stipulates that:

> *"Where a husband and wife make a disposition of property to an international trust or to a trust that subsequently becomes an international trust and, immediately before such disposition, such property or any part thereof or any accumulation thereto is or was, pursuant to the law of its or the law either of the transferors' domicile or residence, determined to be community property, then, notwithstanding such transfer and except where the provisions of the trust deed may expressly provide to the contrary, that property and any accumulation thereto shall, for the purpose of giving effect to that law, be deemed to be community property and be dealt with in a manner consistent with that law but in every other respect shall be dealt with in accordance with the terms of the trust."*

The ITA has been firm on the issue of the legality of an international trust and the reasons for its creation. In that regard the ITA has expressly empowered the court to declare an international trust to be invalid in circumstances where the trust was established under duress or undue influence or by mistake or misrepresentation,[212] where the trust is immoral or contrary to the public policy of the State[213] and where it is created for any unlawful purpose.[214] These provisions were not previously included in the Trust Authority Act 1976.

3.11.7 *The Confidential Relationships Preservation(International Finance) Act 1996*

The Confidential Relationships Preservation (International Finance) Act 1996 ("CRPA 1996") was introduced to ensure that confidential information was only disclosed under prescribed circumstances. The CRPA 1996 defined confidential information to *"...include any and all information and data, whether contained in a written document, electronic storage medium or otherwise, concerning any property or other thing of value in which the principal has a legal or beneficial interest, that would not be generally known to the recipient thereof outside of his relationship with the principal."*[215] This definition was buttressed by Section 3(1) where it was provided that the State's policy was to protect and preserve confidential information *"with respect to business of a professional nature which arises in or is created or disseminated within or is transported into the jurisdiction of the State."* But it was section 3(2) that brought recipients of confidential information within

[212] Section 36(1)(a)
[213] Section 36 (1)(b)
[214] Section 36 (2)
[215] Section 2

the ambit of the CPRA 1996. It did not matter how or where the recipient came into possession of confidential information relating to 'business of a professional nature.' Pursuant to Section 3(2) the disclosure of that information was subject to the CPRA 1996.[216] Essentially, implicit within that section was an extraterritorial element since it required persons within or without SVG who came into possession of confidential information to disclose that information only in accordance with the provisions of the Act.

Sections 3(1) and (2), although in isolation appeared to be extremely harsh and contrary to the money laundering initiative, were nonetheless softened when read in conjunction with Section 3(3) and the Act as a whole. The Confidentiality Act not only subjected Section 3(2) to the provisions laid out in Section 3(3) it also sought to ensure that criminals were not permitted to utilise SVG's policy on confidential information to carry out their crimes. Pursuant to Section 3(3) the Act had no application to the obtaining and disclosure of confidential information in compliance with a court order or by or to the OFI and a police officer of the rank of Inspector and above for the purposes of investigating a criminal offence alleged to have been committed against the criminal laws of SVG or another country. The section also permitted disclosure by a professional person acting in the normal course of business or by a bank or financial institution where it was reasonably necessary for the protection of the interests of the bank or the financial institution.

The CPRA 1996 Act however expressly excluded the disclosure of any information relating to tax or revenue matters.[217] It was this exclusion that created great concern for the FATF and was one of the reasons given for the blacklisting of SVG. This issue will however be discussed in the following chapter where the justification for the blacklisting of SVG will be further assessed. What was also noteworthy about the Act in its original form was that where information concerning the violation of the criminal laws of a foreign country was to be disclosed, it was a requirement that proceedings must have been commenced against a named defendant in that country before the

[216] Section 3(2) of the CRPA 1996 provided that; *"Subject to section 3(3), this Act has application to all confidential information with respect to business of a professional nature, which information arises or is held in or is created or disseminated within or is transported into the State (through whatever medium) and to all persons coming into possession of such information, under claim of right or otherwise, at any time thereafter whether they be within the jurisdiction of the State or outside thereof. Without limiting the foregoing, all confidential information shall remain subject to this Act no matter where it is located and regardless of the medium or media in which it is contained or transmitted."*

[217] Section 3(3)(b)(iii)

information could have been disclosed.[218] Moreover, enquiries that were conducted by a grand jury, an investigating magistrate, enquiring magistrate or any similar investigation and any proceeding which was criminal in the foreign country but which if brought within SVG would have been civil, were not covered as proceedings for the purposes of disclosure. However, the references to grand jury, investigating magistrate and enquiry magistrate were removed on 10th November, 1999 by an amendment in the House of Parliament.[219] This made it easier for those types of proceedings to seek and obtain assistance in criminal matters and was well within the ambit of the requirements of the MACM 1993.[220] Not surprisingly, the FATF in 2000 still referred to that restriction as if it had never been amended and actually listed it as a reason for partially meeting criterion 16[221] of the 25 criteria for assessing non-cooperative countries and territories (see next chapter).

3.12 *The Proceeds of Crime Act 1997*

On 28th August, 1997 with the passing of the Proceeds of Crime Act (PCA),[222] SVG expanded the offence of money laundering to include the proceeds of crimes other than drug trafficking. Money laundering was made an indictable offence.[223] The PCA Act 1997 defined money laundering in the following manner:

> *"A person shall be taken to engage in money laundering where –*
> *(a) the person engages, directly or indirectly, in a transaction that involves money or other property, that is the proceeds of crime; or*
> *(b) the person receives, possesses, conceals, disposes of, or brings into Saint Vincent and the Grenadines money or other property that is the proceeds of crime,*
> *and the person knows or ought reasonably to know that the money or other property is derived, obtained or realised, directly or indirectly from some form of unlawful activity.*[224]

[218] Section 3(4)
[219] Act No. 12 of 1999 provided *"Subsection (4) of section 3 of the principal Act is amended by deleting the words (i) a grand jury investigation, an investigating or enquiry by an investigating magistrate or an enquiring magistrate, or a similar investigation..."*
[220] Section 6(1) of the MACM Act 1993 provides as follows: *"Nothing in this Act derogates from, or prevents the development of, other forms of cooperation whether formal or informal) in respect of criminal matters, between this State and any Commonwealth country or between this State, or any organisation in and the International Criminal Police organisation or any other organisation."*
[221] FATF' Report on St. Vincent and the Grenadines Against the Criteria For Assessing Non-Cooperative Countries. at pp 5-6
[222] This Act has been substantially repealed by Section 68 of the PCMLA 2001which provides as follows: *"This Act repeals and replaces the PCA save and except the sections 59, 60 and 61."*
[223] Section 59 (1) of the PCA 1997
[224] Section 59(3) of the PCA 1997

That definition was so wide that it included any dealing whatsoever in the proceeds of crime or the handling of money or property that was derived from unlawful activity. SVG's determination to combat crime and to cooperate internationally was also reflected in the definition given to the terms "proceeds of crime" and "unlawful activity." Proceeds of crime was defined to include the proceeds that were derived from the commission of one of the scheduled offences of the PCA 1997 and also from the occurrence of any criminal act or omission in another country which, had it occurred in SVG, would have constituted a scheduled offence. [225] The term "proceeds" referred to property that was acquired from the commission of a scheduled offence;[226] and a scheduled offence included money laundering, organised fraud[227] and possession of property derived from unlawful activity.[228] 'Unlawful activity' did not only include the violation of a criminal law in force in SVG but it also referred to the violation of the law of another country.[229] Essentially, SVG was prepared to apprehend, charge, try in a court of law and convict and sentence if necessary, any one present within its jurisdiction for a money laundering offence, irregardless of where the money laundering or predicate offence had actually occurred, provided the act or omission constituted a scheduled offence and the person is present within its jurisdiction.

The PCA 1997 also imposed on financial institutions a legal obligation to maintain and preserve proper records[230] of financial transactions for prescribed periods[231] depending on the type of transaction involved. Moreover, it encouraged those institutions to

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[225] Section 2 of PCA 1997

[226] Ibid

[227] Section 61(1) provides that: *"A person who engages in organised fraud commits an indictable offence and is liable on conviction to –*

> *(a) a fine not exceeding five hundred thousand dollars or imprisonment for a period not exceeding twenty five years, or to both such fine and imprisonment; or*
> *(b) a fine of one million dollars if body corporate.*

Section 61(2) provides that: *"A person shall be deemed to engage in organised fraud if he engages, after the commencement of this Act, in acts or omissions-*

> *(a) that constitute three or more public fraud offences; and*
> (b) *from which he derives a benefit.*

[228] Section 60 (1) provides that: *"A person who, after the commencement of this Act, receives, possesses, conceals, disposes of, or brings into St. Vincent and the Grenadines any money, or other property that he knows or ought reasonably to know to be the proceeds of crime commits an indictable offence and is liable, on conviction, to -*

> *(a) a fine not exceeding two hundred and fifty thousand dollars or imprisonment for a period not exceeding five years, or to both such fine and imprisonment; or*
> (b) *a fine not exceeding five hundred thousand dollars in the case of a body corporate."*

[229] Section 2 of the PCA 1997 which defined unlawful activity as, "an act or omission that constitutes an offence against a law in force in St. Vincent and the Grenadines or against a law of any other country."

[230] Section 49(1) of The PCA 1997

[231] Section 49(2) of The PCA 1997

disclose to a police officer or the Director of Public Prosecutions information about any account in their possession provided that they had reasonable grounds for believing that it was connected with some unlawful activity.[232] The PCA 1997 was later amended[233] to impose a mandatory obligation on financial institutions to provide information on an account if they had reasonable grounds to believe that it was used for any unlawful activity.[234]

The mandatory disclosure requirement was also extended to cash transactions in excess of $US10,000.00 or its equivalent. The Offshore Finance Inspector (OFI) was to be informed if the transaction related to an International Business Company. In all other cases the cash transaction report was to be made to the anti-money laundering Unit or someone designated by the Minister of Finance.[235] By mandating financial institutions to maintain and preserve proper records for prescribed periods, an audit trail was made available to law enforcement officials that would enable them to effectively investigate money laundering offences. The records may also provide very valuable evidence to be used at a trial. Furthermore, a foreign country may be able to obtain access to those records by requesting for assistance either pursuant to the MACM Act 1993 or the MLAT 1998 (see below).

The PCA 1997 made provisions for very serious steps to be taken to ensure that those who committed a scheduled offence must not benefit from their crimes. In that regard there were provisions for the forfeiture,[236] confiscation,[237] seizure and restraint of tainted property.[238] Accordingly, tainted property was defined to include property that was derived from or used for the commission of a scheduled offence.[239] The PCA 1997 also provided law enforcement officials with certain investigative tools that simplified the investigation process and augmented the chances of a successful conviction. These investigative tools included powers of search and seizure,[240] restraining orders,[241]

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[232] Section 51 (1)of the PCA 1997
[233] The amendment was passed in the House of Parliament on 27th August, 1999 and given the assent of the Governor General on 13th December, 1999.
[234] Section 51 (1)of the PCA1997 as amended.
[235] Section 51(2) of The PCA 1997 as amended.
[236] Sections 3-15
[237] Sections 16-22
[238] Sections 23-28
[239] Section 2
[240] Sections 23-29
[241] Sections 30-39

production orders[242] and monitoring orders.[243] During the parliamentary debate on the Proceeds of Crime Bill 1997 it was borne out that the contents of the Bill were the collective efforts of other countries[244] and that SVG was not alone in that legislative exercise. This willingness to harmonise such an important piece of legislation was in itself a demonstration of SVG's willingness to cooperate with other countries in their anti-money laundering efforts.

3.13 *The Mutual Funds Acts of 1997 and 1998*

The Mutual Funds Act (MFA) 1997, contained quite a number of typographical and substantive errors and therefore it was never promoted.[245] Substantive amendments were carried out in the Mutual Funds Bill 1998 which was enacted on 27th day of August, 1998, one year after the enactment of the Mutual Funds Bill 1997. The Mutual Funds Act 1997 created two types of mutual funds[246] namely, the public fund[247] and the private fund[248] and immediately prohibited ICs and IBCs from conducting mutual

[242] Sections 40-45
[243] Sections 46-48
[244] See, St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997 at p 67 as per the Attorney General Hon. Carl Joseph: *"And if I may allay the fears of the Honourable Member on the opposite side, this legislation has been introduced in many other Caribbean countries. In fact I personally had worked on this whilst working in this area for a number of years. We had several meetings so I can inform the House that this is almost a harmonised piece of legislation with the rest of the region. So we are not exceptional in the provision at all in this Bill."*
[245] The records at the St. Vincent and the Grenadines Offshore Finance Authority revealed that no mutual fund was registered under the Mutual Funds Act 1997.
[246] Section 2 of the MFA 1997 defined a mutual fund as *"a company incorporated, a partnership formed or a unit trust organised, under the laws of the State or of any other country or jurisdiction –(a) which collects and pools funds for the purpose of investment in accordance with the principle of risk spreading, and;*
(b) issues shares (as herein defined) that entitle the holder to receive on demand or within a specified period after the demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, the partnership or the unit trust, as the case may be, and includes an umbrella fund whose shares are split into a number of different class funds or sub-funds;"
[247] Section 2 of the MFA 1997 defined a public fund as *"a mutual fund which, by means of publishing or distributing a prospectus or by any other means, offers any shares it issues for subscription or purchase to any interested member of the general public."*
[248] Section 2 of the Mutual Funds Act 1997 defined a private fund as *"a mutual fund that;*
(a) the shares issued by it are not offered to the general public and are owned or held by
(i) not more than fifty investors where the first time investment of each of such investors is not less than seventy five thousand dollars or the equivalent in any other currency; or
(ii) any number of investors where the first time investment of each of such investors is not less than seven hundred and fifty thousand dollars or the equivalent in any other currency; or
(b) is designated as a private fund by regulations."

funds[249] activities without obtaining a license to do so.[250] In this way another restriction was imposed on the *'free for all'* characteristics of ICs and IBCs. Those companies could no longer legally conduct certain types of insurance and investment activities in an unregulated business environment, thus, prohibiting fraudulent activities and severely restricting the abuse of the separate legal personality of ICs and IBCs for the purposes of criminal conduct.

Under the MFA 1997 public funds were subjected to greater scrutiny than private funds. This was so because the public fund was permitted to offer shares to the public by way of a prospectus[251] or any similar document[252] whereas the private fund was prohibited from so doing. Essentially, the autonomy of shareholders of private funds to arrange their affairs amongst themselves in a manner which best suited their own investment requirements and expectations was maintained by the MFA 1997. On the other hand it took a paternalistic approach to unsuspecting and gullible shareholders or even those who were consumed with cupidity. Those investors needed further protection from incompetent advisors and criminal elements. Thus the MFA 1997 not only required the prospectus to be duly filed with the Registrar of Mutual Funds and to be published, it also prescribed the minimum particulars that should be contained therein.[253] The MFA 1997 also prohibited persons from providing services as administrators and managers of mutual funds unless they were granted permission by the Registrar of Mutual Funds to conduct such services.[254] In this way the OFA sought to ensure that only reputable and suitably qualified persons were engaged in the provision of those services.

Moreover the particulars[255] that should accompany an application for registration for a public fund are more detailed than those that are required for a private fund. Interestingly, the MFA 1997 did not prescribe the particulars that should accompany an application for recognition as a private fund. It only required proof that the private fund was either lawfully constituted under the laws of SVG or those of another country.[256]

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[249] Section 8 of the MFA 1997 provided that: *"No private fund shall in or from within the State, carry on business or manage or administer its affairs unless it is registered under this Act."*
[250] Section 18 of the MFA 1997 provides that: *"No public fund shall carry on any business or arrange or administer its affairs in or from within the State unless it is registered under this Act."*
[251] Section 2 of the MFA 1997
[252] Section 14(1) of the MFA 1997
[253] Section 14(2) of the MFA 1997
[254] Section 22 of the MFA 1997
[255] Section 9 of the MFA 1997
[256] Section 19 of the MFA 1997

Those particulars were nonetheless subsequently included pursuant to Regulation 11[257] of the Mutual Funds Regulation (MFR) 1999. Section 9 of the MFA 1997 and Schedule 1 to the said Act outlined the particulars that should be contained in the application for registration of public funds. Those particulars amongst other things required the applicant to submit personal details[258] about the officers, managers, administrators, investment advisors and custodian of the public fund. In this way the Registrar of Mutual Funds was able to have a reasonably good idea as to the identities of the significant players in the public fund and to control the intrusion of criminal elements.

The private fund on the other hand was always exposed to the vagaries of money laundering. Although Section 40 of the MFA 1997 created an offence with penalties and other sanctions for any false or misleading statements and for non-compliance with its provisions, an offence was more easily made out against the public fund which was legally obliged to submit an annual certificate of compliance and maintain proper records and financial statements. Moreover, the legal requirement which empowered the Registrar of Mutual Funds or any person designated by the OFA to access information and records of a fund appeared to have greater effect against a public fund as opposed to a private fund. This is so because the private fund unlike the public fund was not legally obliged under the MFA 1997 to maintain any records and prepare any accounts.

The MFA 1998 maintained and in some instances extended the substance of the provisions outlined above. The additions that are relevant to this chapter relate to; ***(a)*** the introduction of an additional type of fund, referred to as the accredited fund[259] which was placed under the category of private fund and; ***(b)*** the prohibition that was imposed on the use of the words *'fund'* or *'mutual fund'* in the name of an entity without the consent of the Registrar of Mutual Fund. Under the MFA 1997, mutual funds activities were prohibited but there were no restrictions on the use of those words in the names of

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[257] Regulation 11 of the MFR 1999 provided that, *"An application for recognition for a private fund or an accredited fund, whether such fund is constituted under the laws of the State or otherwise, shall be made under the provisions of Section 19 of the Act on Form PAF, the form of which is set out as Exhibit 4 to these regulations. Any information required in the said section 19 and not required in Form PAF shall be provided with the application."*

[258] For example, names, addresses, residency, references, certificate of criminal record if any etc..

[259] Section of the MFA 1998 defined accredited fund as *"a fund:*

(a) the shares of which are made available only to accredited investors and the initial investment in which, in respect of the majority of such investors, is not less than twenty five thousand dollars per investor in the United States currency or its equivalent in any other currency; provided, such minimum investment threshold shall not apply in respect of an investment made by the manager, administrator, promoter or underwriter of the fund; or

(b) *which is designed as an accredited fund by regulations;"*

IBCs or ICs. This addition was a clear demonstration that efforts were made by SVG to remove all doubts about the nature of the business activities in which IBCs and ICs were allowed to engage. The prohibition on the use of IBCs and ICs for insurance and mutual funds businesses, in the absence of the relevant licenses, was sending an unequivocal message internationally that the activities of those companies (especially where they were used for investment purposes) were becoming increasingly regulated.

What is however noteworthy about the MFA 1998 and the accompanying Mutual Funds Regulations ('MFR') 1999 is that together they; ***(a)*** effectively establish the 'know your customer' principles as required in accordance with the information requested on the forms prescribed by Regulations 10, 11 and 12 of the MFR 1999; ***(b)*** increased the accountability of mutual funds, especially private funds as required pursuant to Regulations 4, 19, 23 and 24 and; ***(c)*** introduced greater transparency in the activities of mutual funds in accordance with Regulations 22, 23 and 24. Those attributes represent the hall marks of a country that places the anti-money laundering initiative at the centre of its legislative agenda.

3.14 *The Mutual Legal Assistance in Criminal Matters Treaty 1998*

The Mutual Legal Assistance in Criminal Matters Treaty ("MLAT") between SVG and the USA was executed on 8th January, 1998. This Treaty essentially provided the basis on which the contracting parties would mutually assist each other in connection with the prevention, investigation and prosecution of criminal offences.[260] As have already been indicated above, SVG's MACM Act 1993 only applies to Commonwealth Countries although provisions have been made for the incorporation of any bilateral treaty with a non-Commonwealth State.[261] Apparently, such incorporation is only effective on the publication of Regulations which state that the MACM Act 1993 applies to the country in question, the USA.[262] Up to the time of the blacklisting of SVG in June 2000, no Regulations were made subjecting the USA to the provisions of the MACM Act 1993. This therefore raises the question as to whether MLAT had any force and therefore could have imposed any obligations on SVG. It is indeed arguable that Section 37 of the

[260] Article 1 of the MLAT 1998, *"The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of criminal offences, and in proceedings related to criminal matters."*
[261] Section 30(1) of the MACM Act 1993
[262] Section 30(2) of the MACM Act 1993

MACM Act 1993 accorded the MACM Act primacy over every other arrangement concerning mutual assistance in criminal matters. Section 37 provides as follows:

> *"The provisions of this Act shall take effect notwithstanding any provision of any other Act to the contrary, to the extent that any such provision of any other Act shall be deemed to have been hereby amended to the extent required to ensure compliance with the relevant provisions of this Act."*

When Section 37 is read in conjunction with Section 30 of the said Act it would appear that the MLAT could only be implemented after Regulations have been made to that effect. Thereafter, the provisions of the MACM 1993 become applicable to that Treaty. If however the treaty had been ratified,[263] then SVG and the USA were bound in international law.[264] SVG could not rely on its failure to make the necessary implementing Regulation as a justification for any breach on international law which results.

During the parliamentary debate on the MACM Bill 1993 the Attorney General in his presentation, after having referred to the objects of the Bill and its application to Commonwealth countries, expressly indicated that; '*Finally the Bill contains provisions for the extension of mutual assistance to like minded Government of States outside the Commonwealth by means of regulations made under the Act pursuant to bilateral arrangements to be concluded with such governments.*'[265] This seems to represent an unequivocal statement that parliament intended to extend mutual assistance in criminal matters to countries other than the Commonwealth by including the appropriate provisions in the Regulations that would give effect to any relevant bilateral arrangement that was made between SVG and any other foreign country. Accordingly, it raised the question as to whether, insofar as the treaty was concerned, the MACM Act had no power to implement any provision with which it is not compatible.

The first major inconsistency is provided under Article 1 paragraph 3 which provides that:

> *"Except as otherwise provided in this Treaty, assistance shall be provided without regard to whether the conduct which is the subject of the investigation, prosecution, or processing in the Requesting State would constitute an offence in the Requested State."*

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[263] Shaw M., "International Law," Cambridge, 5th edn. 2003 at p. 820 where he stated that: *"Ratification in the case of bilateral treaties is usually accomplished by exchanging the requisite instruments..."*

[264] Article 14 of the Vienna Convention on the Law of Treaties 1969

[265] St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993 at p 44.

Under the MACM Act 1993 assistance may be granted where the Requesting State has either reasonable grounds for believing[266] or in some instances reasonable grounds for suspecting[267] that the assistance is relevant to a criminal proceeding[268] and for the location and identification of a person or thing. Article 1 paragraph 3 of MLAT 1998 seemed to have dispensed with having reasonable grounds to believe or suspect or even ignoring the fact that the assistance should be relevant to a criminal proceeding. It is clearly inconsistent with the provisions of the MACM Act 1993. Moreover, pursuant to Section 4 of the MACM Act 1993, the central authority[269] for SVG must be designated by order and published in the gazette. This was done on 11th May, 1999 wherein the Director of Public Prosecutions was designated the central authority for SVG with retroactive effect to August 1994.[270] It is noteworthy that Article 2 paragraph 2 of the MLAT 1998 designated the Attorney General or a person designated by the Attorney General as the central authority of SVG. There are several other areas of inconsistencies between the provisions in the MACM Act 1993 and the MLAT but the scope of this chapter does not permit any further elaboration in that regard. However, despite those inconsistencies, by executing the MLAT with the USA, SVG had shown its willingness to cooperate with the USA in order to apprehend and convict those who are involved in criminal activities.

3.15 *Conclusion*

SVG's legislative efforts to combat money laundering commenced during the same year but shortly before the conclusion of the Vienna Convention 1988. The emphasis of SVG's earlier legislation was against laundering the proceeds of drug trafficking. It is not difficult to see the reason for such emphasis, especially when there were allegations

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[266] See Sections 7, 8, 9, 10, 11 of the Mutual Assistance in Criminal Matters Act 1993

[267] See Sections 15, 16 and 17 of the MACM Act 1993

[268] Section 2 of the MACM Act 1993 defines Criminal proceeding to mean ; *"(a) for the purposes of Part II, proceedings certified by the central authority for this State to be criminal proceedings which have been, or could be, instituted in this State; or*

(b) For the purposes of Part III, proceedings certified by the central authority for any Commonwealth country making a request for assistance under this Act to be criminal proceedings which have been, or could be, instituted in that country,

In respect of an offence committed, or suspected on reasonable grounds to have been committed, against the law of Saint Vincent and the Grenadines or, as the case may be, of the Commonwealth country making the request for assistance;"

[269] Section 2 of the MACM Act 1993 defines central authority to mean;

"(a) in relation to this State, the person or authority designated pursuant to section 4; or

(b) in relation to any Commonwealth country, the person or authority designated by that country for the purposes of transmitting and receiving requests under the scheme;"

[270] Regulation 2 of the MACM (Central Authority Designation) Order, 1999

that SVG was used as a transhipment point for cocaine originating in Latin America and when there appeared to have been an increase in drug trafficking in SVG. Moreover, drug trafficking was heralded by many countries as the basis and in most instances, the life blood of organised crime. The philosophy at the time was that organised criminal activities would be significantly reduced if the profit incentive of drug trafficking was inexorably undermined. This was to be done by; ***(a)*** criminalising the proceeds of crime such that persons who knowingly benefited from those proceeds had committed criminal offences and; ***(b)*** confiscating the proceeds of crime so as to deprive those convicted of a drug related offence from deriving any benefits from his criminal conduct.

The articles of the Vienna Convention reflected those sentiments and encouraged the parties to the Convention to implement measures that would criminalise drug money laundering, confiscate the proceeds of drug trafficking and cooperate with each other to investigate, prosecute, convict and where relevant extradite those persons that traffic in drugs and psychotropic substances. It appears that the laws of SVG effectively implemented the Vienna Convention and even went further by extending the criminalisation of money laundering beyond the boundaries of drug related crimes. The money laundering process is fluid and different typologies arise especially after the ingenuity of the launderer has been discovered. Accordingly, anti-money laundering legislation needs to be sufficiently flexible but also abundantly clear and reasonably certain in order to apprehend the transgressors. SVG demonstrated its willingness to join in the universal fight against money laundering. This seemed to be the central focus of the parliamentary debate during the passage of the legislation discussed above.

The regulatory framework of the OFSS may not have been archetypal or even a panacea for today's money laundering problems. But which country can proudly boast that its legislation has significantly impacted on its money laundering activities? However, within the context of organised criminal activities in SVG which were virtually non-existent the regulatory and supervisory framework appeared to be adequate. Prior to its being blacklisted SVG had never experienced a money laundering scandal. In the money laundering rankings of the International Narcotics Control Strategy Report between 1993 and 1996 SVG was ranked as low to medium risk.[271] In 1999, about a

[271] Griffith I., "Drugs and Security in the Caribbean Sovereignty under Seige" Penn State Press, 1997 at pp 110-111.

year prior to being blacklisted by the FATF, SVG was once again ranked relatively low by John Walker as a destination that is favoured by money launderers.[272] There was no evidence of any organised criminal activities in the country and neither had anyone been tried or convicted of a money laundering offence.

Nonetheless, the plethora of laws that were passed endeavoured to prohibit money laundering activity but most importantly, it created the legislative environment for other countries to obtain assistance in their efforts to monitor the activities of an offender and prosecute him successfully. It is concluded that, in terms of the formal law at least, SVG had done all that was required to provide for safeguards against its OFSS being used for criminal activities, without too seriously preventing the industry from competing effectively in the international financial market. The manner in which the legislation could have been of such assistance will be further discussed in the following chapters. The next chapter will however assess the reasons that were given by the FATF for the blacklisting of SVG.

[272] Walker J., "How Big is Global Money Laundering," JMLC, 1999, Vol. 3, No. 1 pp. 25-37 at p. 30

Chapter 4. "An Evaluation of the Reasons for the Blacklisting of SVG by the FATF."

4.0 *Introduction*

In June 2000[1] the FATF included St. Vincent and the Grenadines (SVG) on the list (blacklist) of 15 countries that it considered to be non-cooperative in the fight against money laundering. The FATF conducted its review of SVG in accordance with its 25 assessment criteria for determining whether countries have the ability and capacity to cooperate at the international level in the fight against money laundering. It concluded that SVG met 17 out of the 25 criteria for assessing non-cooperative countries and territories (NCCTs). In its report[2] on SVG, the FATF stated that in carrying out its examination, it took steps to collect all relevant facts, including the country's legislation.[3] Although the legislation to which the FATF referred was stated in the report, no mention was made about the facts that the FATF considered to be relevant to the review process. Therefore, in assessing the accuracy of the FATF's conclusions, it is necessary to evaluate the regulatory and supervisory framework of the financial sector against the 25 assessment criteria of the FATF. In conducting the evaluation it will be argued that the FATF; ***(a)*** did not conduct an accurate assessment of the regulatory and supervisory framework of the financial system in SVG; ***(b)*** was not consistent in the manner that it carried out its assessment; ***(c)*** did not review all the relevant legislation and; ***(d)*** did not recognise international legal principles of non-intervention and the sovereign equality of States. Accordingly, it will be concluded that the regulatory and supervisory framework of SVG adequately supported effective cooperation with other States in an effort to combat money laundering activities.

4.1 THE FATF's CRITERIA FOR ASSESSING NCCT's

In its report on SVG the FATF stated that:

> *"There is ... a lack of either any formal national policy against money laundering or sustained commitment to implement properly the FATF and CFATF recommendations."*[4]

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1. FATF Report, "Review to Identify Non-Cooperative Countries or Territories: Increasing The Worldwide Effectiveness of Anti-Money Laundering Measures", June 2000.

2. FATF- "Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries"-20th June 2000.

3. The legislation included: DTOA 1993; MACM Act 1993; IBA 1996; ITA 1996; CRPA 1996; IBC Act 1996; The PCA 1997 and the; MFA 1997 and 1998.

4. FATF- *"Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries"*-20th June 2000., p 1

This statement is wrong. SVG does have a formal national policy against money laundering. Moreover, as will be demonstrated later in this chapter, the government had taken steps to implement the Caribbean Financial Action Task Force (CFATF) recommendations. It is not quite clear which FATF recommendations SVG did not implement properly since there was no record to that effect. The June 2000 report was the result of the first review that was conducted by the FATF. Representatives of SVG met with officials of the FATF in Miami, USA on 8th June, 2000 to discuss SVG's regulatory and supervisory framework. There is no available record of any further dialogue between SVG and the FATF after the meeting on 8th June, 2000 and before publication of the FATF's Report that blacklisted SVG. Therefore, apart from the 25 assessment criteria against which the legislation of SVG was assessed and bearing in mind that SVG was (and still is) not a member of the FATF, there remains some uncertainty as to which FATF recommendations SVG did not properly implement.

It is also not altogether clear what the FATF meant by *"formal national policy against money laundering."*[5] Therefore an examination of this term is necessary to support the contention that, contrary to the FATF's pronouncement, SVG did at the time of the blacklisting and still does have a money laundering policy. The Oxford dictionary defines 'formal' as *"used or done or held in accordance with rules, convention, or ceremony."*[6] It defines 'national' as, *"of or common to a nation or the nation."*[7] 'Policy' is also defined as *"a course or principle of action adopted or proposed by a government, party business or individual etc."*[8] When those definitions are applied to the measures that were taken by the government of SVG, the inaccuracy of the statement will be accentuated.

In chapter 3.1[9] mention was made of the DPMA 1988 wherein the government of SVG declared its intention to combat money laundering activities, albeit for crimes relating to drug trafficking.[10] This intention was further reinforced in 1993 with the passing of the

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[5] FATF- *"Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries"*-20th June 2000., p 1

[6] Oxford English Reference Dictionary 2nd edn. ,2002, at p 544

[7] Ibid at p 963

[8] Ibid at p 1120

[9] See Section 17 of the DPMA 1988

[10] Section 28(2) of the DPMA 1988 provides that: "Without prejudice to subsection (1), where a person is convicted of a drug trafficking offence the court shall, in passing sentence, order forfeiture to the Crown of-

(a) any article;
(b) any money; or
(c) any valuable consideration,

relating to the offence.

DTOA 1993. During the parliamentary debate on the Drug Trafficking Offences Bill 1993, the government was in no doubt as to its policy to eradicate drug trafficking through SVG by making unlawful certain conduct which included dealing in the proceeds of crime. A government Minister, Hon Jeremiah Scott referring to the Bill retorted that:

> *"...it has not come a minute too soon, however I feel that it is just a little too late...regardless to what draconian measures come to this House, I don't think the matter (referring to drug trafficking) is getting better. This is why I don't want to offer any kind of compromise situation for the offending persons in this regard. There should be no compromises, when they (meaning drug traffickers) are held they should be held, Mr. Speaker, even as far as I am concerned without bail."*[11]

Some of the provisions in the DPMA 1988 which relate to the laundering of the proceeds of crime are almost repeated verbatim in the DTOA 1993. For example, Section 17(1) of the DPMA 1988 is *pari materia* with Section 21(1) of the DTOA 1993.[12] This provision clearly represented the government's position not only on drug trafficking but also on the laundering of the proceeds of drug trafficking. The DTOA 1993 like its precursor the Drugs (Prevention of Misuse) Act 1988[13] penalised persons who assisted the drug trafficker to retain the benefit of drug trafficking. It also went further to penalise those, including the drug trafficker, who concealed, disguised, converted or transferred the proceeds of drug trafficking (see chapter 3.6).[14] Moreover, in an effort to curtail the activities of drug trafficking parliament also made provisions in the DTOA 1993 for the seizure and detention, forfeiture and confiscation of the proceeds of drug trafficking (see chapter 3.6).

Section 28(3) provides that: "Forfeiture under this section shall extend-

(a) to any property which there is reason to believe has been obtained from the proceeds of anything relating to the offence for which a person is convicted under this Act or to a conspiracy to commit any such offence; or
(b) to anything into which any such property has been converted.

[11] St. Vincent and the Grenadines Parliamentary Debates 16th December, 1993 pp 30-31

[12] Section 21(1) of the DTOA 1993 provides that; *Subject to subsection (3), any person who, after the date of coming into operation to this Act enters into or is otherwise concerned in an arrangement whereby –*

(a) the retention or control by or on behalf of any other person, in this section referred to as "A," of proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
(b) "A"'s proceeds of drug trafficking are used-
  (i) to secure that funds are placed at "A"'s disposal or
  (ii) for "A"'s benefit to acquire property by way of investment

knowing or believing that "A" is a person who carries on or has carried on drug trafficking or has at any time received any payment or other reward in connection with drug trafficking carried on by him or another, is guilty of an offence.

[13] Section 17(1)

[14] Section 22(1) and (2) of the DTOA 1993 at note 29 in Chapter 3.6

Chapter 4. "An Evaluation of the Reasons for the Blacklisting of SVG by the FATF."

In 1996, members of parliament in the parliamentary debate on six new pieces of offshore legislation[15] was insistent that steps should be taken to ensure that issues concerning the ubiquitous money laundering problem should not tarnish the OFSS. In that regard the Prime Minister Sir James Mitchell cautioned that:

> *"We recognise that there are certain clouds that tend to hover over offshore operations. One is the question of money laundering of sources coming from drugs or from terrorism or from weapons trading. We want to ensure as far as we can that we do not become a vehicle for any of that kind of activity..."*[16]

Sir James Mitchell further stated that:

> *"Our confidentiality will be aimed at asset protection, not money laundering and people want to preserve their assets for all kinds of legislative processes and all kinds of disputes. We also want to ensure that we do not become a haven for any fraudulent conversion and we will do our best about that, so we have got to make sure that our image is as clean as possible."*[17]

Money laundering has always been opposed by the government. Prior to 1997 there was no specific money laundering legislation that criminalised dealings in and with the proceeds of crime. However, as was stated above the DPMA Act 1988 and the DTOA 1993 contained provisions that criminalised the assisting, concealing, disguising, converting and transferring the proceeds of crime. With the introduction of the new offshore legislation, the government's position on the use by criminals and money launderers of the opportunities that were created was clear and unequivocal. Investors were welcomed to its shores to engage in the investment opportunities that were available but they were not expected to be criminals or to engage in money laundering activities.[18] This position was enunciated by Prime Minister Sir James Mitchell when he presented the welcoming address at a Caribbean Offshore Conference in Puerto Rico on May 21st, 1997. He stated that:

> *"...Indeed, many aspects of our new package of legislation represent strategic movements into new frontiers of offshore finance and include careful refinements of traditional administrative practices. We intend to be efficient and extremely cautious. No doubt the world will be taking note of St. Vincent and the Grenadines as a responsible leader in the offshore finance industry. As such, we will rigorously maintain our deep respect for the rule of law. Money Laundering from drug trafficking and trading in illegal weapons will not be tolerated in the administration of our very strict laws. As we launch our campaign for new opportunities in the international finance sector, we unequivocally warn that we will defend against international crime as vigorously as we protect against unwarranted intervention into the privacy of the financial affairs of the operations of which are governed by our offshore legislation. It*

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[15] See Chapter 3.11.
[16] St. Vincent and the Grenadines Parliamentary Debate 27th June, 1996 p 22
[17] St. Vincent and the Grenadines Parliamentary Debate 27th June, 1996 p 26
[18] Mitchell J., "The Rebirth of an Offshore Jurisdiction," Offshore Investment Journal, February 1997, Issue 73, at p.34

is our solemn intention to build up a tradition of cleanliness, and to become a haven for honest men so that they and their families can enjoy the fruits of their labour. To that end, we will not accommodate any individual or institution that will contaminate the hygienic financial environment that we strived so hard to encourage and we are now endeavouring to maintain."[19]

This statement and previous statements of a similar nature were indeed portentous. The money laundering problem was no longer going to be addressed within the regime of the drugs legislation. Plans were afoot to widen the ambit of the legislative fight against money laundering activities.[20] These plans culminated with the passing of the PCA on 28th August, 1997[21] which made provisions for the circumstances under which a person may be convicted of money laundering and the likely consequences of such a conviction. In chapter 3.12 it was shown that the PCA 1997 not only made money laundering an indictable offence[22] but it also criminalised the possession of property derived from unlawful activity[23] and organised fraudulent activities[24] and provided for the forfeiture[25] or confiscation[26] of tainted property.[27] Moreover, the Act imposed on financial institutions the obligation to retain records of financial transactions for a

[19] Mitchell J., "A Season of Light-A series of Messages on Development in St. Vincent and the Grenadines," Concept Publishing Inc, Waitsfield, Vermont 2001 at pp 61-62.

[20] The Proceeds of Crime Bill was introduced to the House of Parliament about three years before it was finally passed on 28th October, 1997: See St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997 p 69- Hon Carl Joseph *"...this Bill has been around for about three years, at least two to three years, and it was sent to a select committee and has been receiving the attention of a select committee for about two and one half years."*

[21] See Chapter 3.12

[22] Section 59(3)

[23] Section 60 (1) provides that: *"A person who, after the commencement of this Act, receives, possesses, conceals, disposes of, or brings into St. Vincent and the Grenadines any money, or other property that he knows or ought reasonably to know to be the proceeds of crime commits an indictable offence and is liable, on conviction, to -*

(c) a fine not exceeding two hundred and fifty thousand dollars or imprisonment for a period not exceeding five years, or to both such fine and imprisonment; or

(d) *a fine not exceeding five hundred thousand dollars in the case of a body corporate."*

[24] Section 61(1) provides that: *"A person who engages in organised fraud commits an indictable offence and is liable on conviction to –*

(c) a fine not exceeding five hundred thousand dollars or imprisonment for a period not exceeding twenty five years, or to both such fine and imprisonment; or

(d) a fine of one million dollars if body corporate.

Section 61(2) provides that: *"A person shall be deemed to engage in organised fraud if he engages, after the commencement of this Act, in acts or omissions-*

(c) that constitute three or more public fraud offences; and

(d) *from which he derives a benefit.*

[25] Section 8 of the PCA 1997 (repealed on 21st November, 2001)

[26] Section 16 of the PCA 1997 (repealed on 21st November, 2001)

[27] Section 2 of the PCA 1997 (repealed on 21st November, 2001); Tainted property is property derived from illegal activity.

prescribed period[28] and a duty to disclose information about financial transactions to law enforcement authorities in certain circumstances.[29]

The FATF in its report on SVG did mention that it reviewed the DTOA 1993 and the PCA 1997, yet it still reported that 'there is no formal national policy on money laundering.' Those Acts together with the Drugs (Prevention and Misuse) Act 1988 have undoubtedly established a formal policy on money laundering. They established rules (laws) for the criminalisation of money laundering. Together with the anti-money laundering pronouncements that were made by the members of parliament, the laws established a course of action that was proposed by the government for the entire nation. This therefore amounted to a formal national policy on money laundering. The policy is crystal clear, *"money laundering... will not be tolerated in the administration of our strict laws of the country."*[30]

4.2 Criterion 1[31]

The FATF concluded that SVG fell within this criterion due to the deficiencies in the OFSS.[32] The domestic financial services sector was however absolved from any criticism in this regard, mainly because the FATF was satisfied with the Eastern Caribbean Central Bank's (ECCB)[33] money-laundering guidelines and guidance notes.[34] The FATF formed the view that the ECCB was responsible for licensing, regulating and supervising the domestic financial services sector and therefore, the guidance notes and guidelines did not apply to the OFSS.[35] In the absence of such notes and guidelines the

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[28] Section 49 of the PCA 1997 (repealed on 21st November, 2001)
[29] Section 51 of the PCA 1997 (repealed on 21st November, 2001)
[30] Mitchell J., "A Season of Light-A series of Messages on Development in St. Vincent and the Grenadines," 2001 at p. 61.
[31] Criterion 1: **Absence or ineffective regulations and supervision for all financial institutions in a country or territory, onshore or offshore, on an equivalent basis with respect to international standards applicable to money laundering.**
[32] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries," 20th June 2000 at p. 2.
[33] The ECCB is the Central Bank for the OECS territories. These include Anguilla, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.
[34] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries," 20th June 2000 at p. 2.
[35] The International Banks Act 1996 was amended in 2002 to include the ECCB in the supervision of international banks. The amended Section 4(2a) provides as follows: *"The Offshore Finance Inspector shall review the application to ensure that it contains the required information and is accompanied by the prescribed fee and shall then forward completed applications to the Authority*

(a) submitting an application to the Central Bank for its review;
(b) conducted any inquiries that may be considered necessary;

FATF suggested that the regulatory and supervisory framework of the OFSS fell short of international standards. But what were the international standards to which the FATF referred? If the FATF considered that its 25 criteria for assessing non-cooperating countries and territories and or its 40 Recommendations were in essence, the international standards to which it referred, it will be argued in chapter 6 that those criteria and the FATF's money laundering initiative as a whole did not establish any international standards to which SVG should conform. It will also be argued in this chapter and in chapter six that SVG by maintaining its regulatory and supervisory framework was not in breach of its international obligations to any of the FATF member countries. Moreover, the FATF also charged that the staff at the Offshore Finance Authority (OFA) was inadequate and the controls on offshore institutions were rudimentary.

The reasons that were proffered by the FATF in arriving at its conclusions appeared to be mere conjecture and for the most part untenable. They will therefore be examined and refuted by arguing on a tripartite platform. Firstly, the ECCB was not responsible for the licensing, regulation and supervision of the domestic financial services sector. Its supervisory and regulatory powers were restricted to the operations of domestic commercial banks.[36] Insofar as the licensing process was concerned, the ECCB investigated[37] each application for a banking licence then made recommendations[38] to the Minister of Finance who was authorised by law to issue banking licenses.[39] During the period that the FATF conducted its review, there were seven domestic commercial banks in SVG.[40] Furthermore, there were three major Credit Unions, one Building Society and thirteen Motor and General Insurance Companies located in the domestic financial services sector.[41] These institutions were housed within the domestic financial

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(c) *communicating with any persons, bodies or authorities as required*."

Section 15 of the IBA 1996 is amended and the new Section 15(2c) provides: *"Copies of the audited accounts and quarterly returns must be submitted to the Central Bank, through the Authority."*

The Offshore Finance Authority is responsible for the administration of the offshore financial services sector by virtue of Section 8(1) of the SVGOFA Act 1996.

[36] http:// www.eccb-centralbank.org/Who_We_Are.asp

[37] Section 4(2) Chap 63 of the 1990 Revised Laws of St. Vincent and the Grenadines.

[38] Section 4(3) Chap 63 of the 1990 Revised Laws of St. Vincent and the Grenadines.

[39] Section 4(4) Chap 63 of the 1990 Revised Laws of St. Vincent and the Grenadines.

[40] National Commercial Bank, Barclays Bank plc, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Royal Bank of Trinidad and Tobago, St. Vincent Cooperative Bank and First St. Vincent Bank Ltd.

[41] www.stvincentoffshore.com/offshore_indus.htm -

services sector. However, none of these institutions was specifically licensed, regulated and supervised by the ECCB.

The Cooperative Societies Act 1999[42] which regulated Credit Unions, accorded powers to the Registrar of Cooperatives to register and supervise Cooperatives (including credit unions).[43] The Building Societies Act 1941, as amended, empowered the Registrar of the High Court to register[44] and supervise[45] the conduct of Building Societies. The Insurance Act (IA)1970, as amended, accorded a wide array of powers to the Registrar of Insurance and the Minister of Finance[46] to regulate[47] and supervise the conduct of Insurance operations. There is no mention of the ECCB in any of those Acts. Accordingly, to say that the ECCB *"is responsible for the licensing, regulation and supervision of the domestic financial services sector"*[48] is inaccurate. It is clear from the legislation that the ECCB's regulatory and supervisory responsibilities were restricted to the commercial banking sector. Therefore, the system (e.g. the money laundering Guidance Notes and Guidelines) that the ECCB introduced was destined for the commercial banks. If they were adopted by any of the other aforementioned financial institutions it would have been on a voluntary basis, in the same way that an offshore

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[42] Section 2 of the Cooperative Societies Act 1999 defines a Cooperative or Cooperative Society as *"a body corporate registered under this Act which consists of a group of people small or large, with a commitment to joint action on the basis of democracy and self-help in order to secure a service or economic arrangement that is both socially desirable and beneficial to all taking part."*

[43] Section 5(1) of the Cooperative Societies Act 1999 provides that: *"There shall be a Registrar of Cooperatives Societies who shall have such professional, administrative and other staff as are necessary to assist him in the execution of his functions under this Act"*

Section 5(2) provides: *"The Registrar shall perform the following functions:*

(a) the registration of all societies;
(b) the supervision of all societies;
(c) to liaise with all societies;
(d) the stimulation of community awareness
(e) the initiation and encouragement of organised activities for the development societies;
(f) the management of the Department of Cooperatives

[44] Section 8 of the Building Societies Act 1941 (or Chapter 324 of the 1990 Revised Laws of St. Vincent and the Grenadines) provides as follows: *"The persons intending to establish a society under this Act shall transmit to the Registrar two copies of the rules agreed upon by them for the government of the society, signed by three of such persons and the intending secretary or other officer, and the Registrar, if he finds that the rules contains all provisions set forth in section 7, and that they are in conformity with this Act, shall return one copy of the rules to the secretary or other officer of the society, with a certificate of incorporation, and shall retain and register the other copy."*

[45] Section 8 which relates to the amendment of rules, Section 8 concerning combinations of Building Societies and amalgamations; Section 28(30) regarding the submission of annual accounts; Section 30 confirming by endorsement the discharge of a mortgage

[46] Sections 49-63 of the IA 1970 (or Chapter 103 of the 1990 Revised Laws of St. Vincent and the Grenadines)

[47] Sections 6 of the IA 1970 (or Chapter 103 of the 1990 Revised Laws of St. Vincent and the Grenadines) provides that: *"An application for registration as an insurer shall be accompanied by such documents as may be prescribed."*

[48] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 2

entity may have voluntarily adopted them as well. It is however important to note that one of the fundamental differences between the domestic commercial banks and the international banks is that residents were precluded from ordinarily doing banking business with an international bank. The International Banks Act (IBA) 1996 as amended provided that:

> *"The holder of a Class I or a Class II Offshore Banking Licence shall not, without the written approval of the Authority, carry on any banking business with any Resident except in connection with the rendering of offshore banking services from within the State or as expressly provided herein or in other laws governing the operation and activities of the licensee."* [49]

Secondly, it is rather uncanny that the FATF expressed satisfaction with the money laundering guidelines and guidance notes in the domestic financial services sector but identified their absence in the OFSS as a problem.[50] Prior to the blacklisting of SVG there were 30 international (offshore) banks registered with the OFA, of which 2 were licensed in 1997, 10 in 1998, 11 in 1999, 4 in 2000 and 3 that were brought forward from the regime prior to 1997.[51] Those were the only financial institutions that were registered by the OFA. None of those international banks had correspondent banking relationships and therefore they opened accounts with domestic commercial banks through which they transacted their international banking operations.[52] Effectively, deposits to and withdrawals from the offshore banks were transacted through the accounts that they held at the respective domestic commercial banks. In this way the international banks were customers of the domestic commercial banks. The accounts held by international customers in the international banks were affected depending on whether the transaction was a deposit or a withdrawal and the relevant adjustment was made by the domestic commercial bank on the account of the international bank.

In those circumstances the staff at the international banks merely recorded transactions of deposits and withdrawals in the international customers' accounts but did not have any direct contact with the issuing or receipt of cash.[53] All physical monetary transactions were executed in the domestic commercial banks on behalf of the international banks. With this sort of structure in place the international banks could not

[49] Section 9 of the IBA 1996 as amended.

[50] Note here that the IBA prohibited any such interference from the ECCB e.g. *"Section 28(1) provided that: "Except as expressly provided herein, the Banking Act Cap 63 shall not apply to any company carrying on an offshore banking business..."* Chapter 63 of the 1990 Revised Laws of St. Vincent and the Grenadines is the legislation that governs the domestic commercial banks.

[51] Records from the Offshore Finance Authority.

[52] Information obtained by the Offshore Finance Authority from international banks.

[53] Interview with Banks.

have functioned separately and distinctly from the domestic financial services system. They were for this purpose essentially one and the same sector. Therefore, by following the money laundering guidance notes and guidelines, domestic commercial banks were actually subjecting their international customers to the same scrutiny as their domestic counterparts. In that regard the convergence of the two sectors coupled with the satisfactory application of the money laundering guidance notes and guidelines meant that the financial system in SVG had complied with international standards. To dichotomize the two sectors in that way to facilitate the making of pronouncements favourable to the domestic financial services sector and unfavourable to the OFSS, has cast some doubts on the credibility of the FATF's review.

Thirdly, the FATF alleged that the human resources at the OFA were limited since there were only eight members of staff. The government of SVG responded[54] to this allegation in the following manner.

> *"The Offshore Finance Authority (OFA) has recognised the need to increase and improve its human resources as the registration of offshore entities increase. In addition to the current staff level of eight (8) members provisions are already being made for the appointment of two more persons during the month of June, 2000. It is also important to note that the Offshore Finance Authority has installed a Computerised Registry System which significantly obviates the need for manual inputs into certain aspects of the registration process."*[55]

The government's response further stated that:

> *"The Offshore Finance Authority has also engaged the services of a banking consultant to train staff in banking supervision and to establish a supervisory framework."*[56]

In the light of the fact that criterion 1 of the 25 criteria for assessing non-cooperative countries and territories relates to ineffective regulations and supervision, cognizance should be given to the number of entities that were registered by the OFA at the time of the FATF's Report. In this way a more meaningful and satisfactory assessment could have been made to determine whether the staffing complement at the OFA was inadequate. Prior to the blacklisting of SVG the OFA had 30 international banks on its register, 4[57] of which had acquired their licenses a few weeks earlier[58] and 11 of which

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[54] Response of Government Of St. Vincent and the Grenadines To Report On St. Vincent and the Grenadines Against The 25 Criteria For Assessing Non- Cooperative Countries, 6th May, 2000.
[55] Response of Government Of St. Vincent and the Grenadines To Report On St. Vincent and the Grenadines Against The 25 Criteria For Assessing Non- Cooperative Countries, 6th May, 2000, p 5
[56] Ibid
[57] The records of the St. Vincent and the Grenadines Offshore showed that the 4 banks were Bank Net and Finance Inc., Baltic Bank Ltd., Pacific Bank A.G and International Trade and Investments Bank Ltd-

were issued licenses the previous year (1999). The IBA 1996 required a licensee to submit its audited annual accounts to the OFA within three months from the end of its financial year.[59] Therefore, unless in exceptional cases[60] (which appeared not to have arisen), onsite inspections[61] would not have commenced for banks that were licensed in 1999 and 2000 since they would have been operating for less than a year.

The main issue that required some consideration was whether the existing staffing levels could have adequately supervised the remaining fifteen international banks? Of the nine (the 8 staff members abovementioned did not include the Offshore Finance Inspector) staff members, six were designated a supervisory role. The Offshore Finance Inspector (OFI)[62] was a Barrister-at-Law and Chartered Accountant. The Banking Examiner held an Honours Degree in Economics and Management and was completing the Chartered Association of Certified Accountants course. He had over six years experience as an auditor with the auditing firms of Coopers and Lybrand, now Price Waterhouse Coopers and Parnell Kerr Forster. The Registrar had twenty five years experience in the commercial Registry and held the position of Deputy Registrar of the High Court. The Assistant Registrar held a Bachelor of Laws (LLB) Degree. The other two persons were the Electronic Data Processing Officer and a Registry Clerk. Together with the Banking Consultant those five persons arguably could have adequately supervised the operations of those fifteen international banks.

The Computerised Registry System enabled Registered Agents to submit applications for registrations of offshore entities and to carry out other transactions online, thus significantly reducing the time that the OFA's staff spent recording transactions and dealing with queries. In the government's response(see above) to the FATF's Report, two more members of staff were to be recruited and a Banking Consultant was already

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[58] The records of the St. Vincent and the Grenadines Offshore showed that the licenses were issued as follows: Bank Net and Finance Inc. on 18th February, 2000, Baltic Bank Ltd. On 5th May, 2000; Pacific Bank A.G on 16th May, 2000 and International Trade and Investments Bank Ltd. on 25th May, 2000-

[59] Section 15 (2) of the IBA 1996 as amended in referring to licensees provides that:

> *"The audited accounts shall be forwarded to the Authority within three months from the end of the financial year of the licensee, unless prior written approval for an extension has been granted by the Authority."*

[60] Where the OFA received unfavourable reports about the activities of a bank or where some clarification is required about the information submitted by a bank.

[61] Actually visiting the bank and conducting enquiries of bank staff and records.

[62] Section 8(2) of the St. Vincent and the Grenadines Offshore Finance Authority Act 1996 described the Offshore Finance Inspector as the person who is *"subject to the supervision and control of the Authority Board, manage the day-to-day business of the Authority and of the Authority Board and be responsible for the proper discharge of the duties of the Authority that are delegated to him by the Authority under this Act and under other offshore legislation."*

engaged by the OFA for the purposes of improving banking supervision in the OFSS. SVG it would appear was making every effort to improve its regulatory and supervisory framework. Accordingly, rather than being accused of falling within criterion 1 due to non-compliance with undefined and abstract international standards, it should have been encouraged and commended for its efforts. This perfunctory approach by the FATF at such an incipient juncture in the review process was imperious and demonstrated intolerance. It concealed the virtues of an otherwise plausible initiative and justifies the cynical attention that it received from the countries that were "blacklisted" and prominent writers.[63]

4.3 Criterion 2[64]

The FATF concluded that IBCs are permitted to conduct international banking business and are also permitted to issue bearer shares. Accordingly, it *leads to the possibility for individuals to operate or control a financial institution without having been identified.*"[65] To the extent that an IBC is permitted to issue bearer shares the FATF's conclusion would be accurate. However, as will be demonstrated below it did not automatically follow that a bearer share company could have been issued with an international banking license. The IBA 1996 prohibited the transacting of any international banking business within SVG unless it was conducted by an "eligible company."[66] It defined an "eligible company" as:

> *"eligible company" means a body corporate*
> (a) *having at least one director who is a resident,*
> (b) *which is incorporate, subsisting or continued under the Companies Act 1994 or under the International Business Companies Act, 1996, and*
> (c) *whose objects or business activities are restricted to banking business.* "[67]

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[63] Levi M and Gilmore W- "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" a chapter in Peith M., "Financing Terrorism" Kluwer Academic Publishers 2002 at pp 100-101; Hinterseer Kris, "Criminal Finance, The Political Economy of Money Laundering in a Comparative Legal Context," Kluwer Law International, 2002, at p 244

[64] **Criterion 2: Possibility for individuals or legal entities to operate a financial institution without authorisation or registration or with very rudimentary requirements for authorisation or registration.**

[65] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 2

[66] Section 3(1) of the IBA 1996 provides as follows:

> *"No offshore banking business may be transacted from within the State, in whole or in part, except by an eligible company which is in possession of a license granted hereunder to that company to carry on such an offshore banking business."*

[67] Section 2 of the IBA 1996.

Under the Act both a domestic company which is incorporated under the Companies Act 1994 and an IBC, provided that they satisfied the other two conditions, could attain the status of an eligible company and apply for an international banking license. The mere fact that the incorporation of a company occurred before an application was made to the OFA for an international banking license appeared to have presented a problem for the FATF. The main problem related to the possibility of a bearer share company applying for and obtaining an international banking license. For this purpose a bearer share is a share that is issued to the bearer. On the face of the bearer certificate the owner of the share is recorded as the bearer and not the name of the person who acquired it. The implication of such a situation was that anyone into whose possession the share certificate fell became the owner of the share unless it could have been proven otherwise. Effectively, the share certificate is prima facie evidence of title.[68] In ***Re Bahia and San Francisco Rly Co*** it was held that:

> *"The power of giving certificates is therefore for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares"*[69]

Although that case was not about bearer shares, it supports the proposition that a share certificate is prima facie evidence of title. Bearer share certificates possess the attraction of being negotiable[70] but may facilitate the money laundering process if they fall into the hands of criminals (see chapter 2.4.2).

The Companies Act 1994 prohibits the issuance of bearer shares.[71] However, the IBC Act 1996 permitted the issuance of bearer shares[72] and has further provided that, *"A share issued to bearer is transferable by delivery of the certificate relating to the share."*[73] This undoubtedly compounded the problem since a bearer share could have been transferred from one person to another just by passing it over to the other. Since an IBC, provided

[68] Farrar J, Hannigan B, Furey N, Wyllie P., "Farrar's Company Law" Butterworths, 4th edn., 1998 at p. 248.
[69] (1868) LR 3 QB 584 at 595
[70] Re Harvard Securities Ltd. [1997] 2 BCLC 369
[71] Section 29(2) of the Companies Act 1994 provides: *"No company may issue bearer shares or bearer share certificates."*
[72] Section 19(1) of the IBC Act 1996 before it was amended provided as follows:
"A company incorporated under this Act shall cause to be kept one or more registers to be known as shares registers containing:
...(g) in the case of shares issued to bearer, the total number of each class and series of shares issued to bearer and outstanding at any given time...
[73] Section 22 of the IBC Act 1996

that it satisfied the conditions outlined under Section 2 of the IBA 1996, could have attained the status as an eligible company, the temptation was to conclude that by extension, a bearer share IBC could have applied for and be issued with an international banking license. That conclusion was however, unfounded since the IBA 1996 and the IBR 1996 made provisions for the disclosure of the identities of owners and managers of international banks (see below). Section 4(2) of the IBA 1996 provided as follows:

> *"An application under subsection (1) shall be filed with the Offshore Finance Inspector, shall contain the particulars set out in the schedule hereto, and shall be accompanied by the fee prescribed in the regulations hereunder... "*

Under the paragraphs numbered 3, 4 and 5 of the schedule to which Section 4(2) referred, the names and addresses of all directors, shareholders and officers and managers must be submitted with the application for an international banking license. Moreover, the hegemony of the (IBR) 1996, in relation to the application for an international banking license, should have been considered seriously since it set out in greater detail and further clarified what was required under the IBA 1996 for the licensing of international banks. Section 26 of the IBA 1996 provided as follows:

> *"The Minister acting on the advice and recommendations of the Authority, make regulations generally for carrying the purpose and provisions of this Act into effect and, specifically, for the following purposes -*
> *(a) prescribing anything by this Act authorised or required to be prescribed;*
> *(b) controlling the form of advertising by licensees; and*
> *(c) exempting any person or business, or class of person or business from any provisions of this Act. "*

The IBA 1996 therefore empowered the Minister to make Regulations which are a form of delegated legislation. Such legislation is described as *"the body of legal rules created by subordinate or statutory bodies which have specific powers to do so because parliament has delegated that power to them."*[74] Regulations are usually created by government departments[75] and approved by the Cabinet of Ministers.[76] Therefore, like Acts of Parliament, Regulations serve as a legal source, endowed with the force of law and legal authority. Accordingly, the IBR 1996 formed part of the legislation that governed the international banking sector. Under paragraphs 5, 6 and 7 of the First Schedule of the IBR 1996, the applicant for an international banking license was required to submit the names and addresses of all its shareholders, directors and officers and managers respectively. The identification requirements that were prescribed in the schedule and

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[74] Antoine R., "Commonwealth Caribbean Law and Legal Systems" Cavendish Publishing Limited 1999 at p. 173.
[75] Ibid
[76] Oxford Reference English Dictionary revised 2nd edn. at p. 202 wherein the Cabinet of Ministers was defined as , *"The committee of senior ministers responsible for controlling government's policy. "*

referred to under Section 4(2) of the IBA 1996 were identical to those required under paragraphs 5, 6 and 7 of the IBR 1996. Moreover, Section 12 of the IBA 1996 provided that:

> *"No shares or other interests, whether legal or equitable, in a licensee shall be issued transferred, or otherwise disposed of without the prior written approval of the Authority... "*

Section 17(2) provided that:

> *"Unless exempted by the Authority pursuant to subsection (3) a licensee shall, prior to the appointment of a director or other senior officer, apply to the Authority for its written approval of the appointment"*

The applicant was therefore required to submit the names and addresses of all its shareholders, directors and officers to the Authority. If the application was successful and a license was granted, the licensee was also required to seek the approval of the Authority before any transfer of its interest could have been executed or for the approval of the appointment of directors and senior officers. In this way the Authority was supposed to be at all times informed about the names and addresses of all the shareholders and directors of the licensee. The purpose of the bearer share is to conceal, for whatever reason, the identity of the owner of the share and by extension the company. But as was demonstrated above, the laws demanded the disclosure of the identities of the owners and directors to the Authority. By omitting to consider the IBR 1996 among its list of legal sources that was used in the review process, the FATF was limited in its assessment of the international banks' licensing procedure. Accordingly, it erroneously concluded that individuals were able to operate or control an international bank without having been identified.

4.4 Criterion 3.[77]

The FATF concluded that SVG fell within the captioned criterion. It reported that:

> *"...nothing in the International Banks Act 1996, provides measures to guard against holding of management functions or control or acquisition of a significant investment in financial institutions by criminals or their confederates."*[78]

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[77] **Criterion 3: Absence of measures to guard against holding of management functions and control or acquisition of a significant investment in financial institutions by criminals or their confederates.**

[78] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 2

Under the schedule to the IBA 1996 the applicant is required to submit character references in writing together with evidence in the form required by the Authority, that neither the applicant nor any director or officer of the applicant has a criminal record.[79] Further references were also required, including one from an internationally recognised bank.[80] The first schedule of the IBR 1996 also contained similar provisions.[81] To ensure that the applicant entertained a reluctance to submit false information to OFA, the IBA 1996 further provided that:

> *"A licensee or applicant for a license under this Act, or any director or officer of a licensee or applicant who knowingly or wilfully supplies false or misleading information to the Authority shall be guilty of an offence... "*[82]

The other provisions of the IBA 1996 which regulated the transference of interests in the licensee[83] and appointment of directors and senior officers[84] have already been discussed above. There was also a general provision in the IBA 1996 that required notification from the licensee of any change in the particulars that were submitted in the application for the license.[85] These legislative measures were undoubtedly prescribed to prevent criminals from participating in the opportunities offered in the OFSS. During the parliamentary debate on the International Banks Bill 1996 the Prime Minister Sir James Mitchell again expressed the government's position on money laundering (see above at 4.1).[86]

The FATF appeared to be guided by this impercipient notion that because a bearer share IBC could also be an "eligible company," pursuant to Section 2 of the IBA 1996, that it could legally acquire an international banking license without having to disclose the identities of its ownership and management. That fallacy with its confuted conclusions has already been extensively discussed above and requires no further elaboration. It is therefore not surprising that the FATF compounded its erroneous conclusion in criterion 3 by repeating the tenuous arguments proffered in criterion 2.

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[79] Paragraph 11
[80] Paragraph 15
[81] Paragraphs 14 and 15
[82] Section 23(1)
[83] Section 12 of the IBA 1996
[84] Section 17(2) of the IBA 1996
[85] Section 6 of the IBA 1996 provided as follows: *"Where a change occurs in the particulars of a licensee as set out in the application for the license, the licensee shall, as soon as possible there after, inform the Authority in writing of the nature and circumstances of the change"*
[86] St. Vincent and the Grenadines Parliamentary Debate 27th June, 1996 p 22

4.5 Criteria 4[87] and 5[88]

The FATF concluded that SVG fell within this criterion. It further stated that nothing in the laws examined *"seem to prohibit the existence of anonymous accounts or accounts in obviously fictitious names."*[89] The FATF's conclusion is correct. Neither the Banking Act Cap 63 of the 1990 Revised Laws of SVG nor the IBA 1996 contained any provisions that expressly prohibited the existence of anonymous or fictitious accounts. The government of SVG responded that as a matter of practice SVG's domestic commercial banks did not open anonymous accounts or accounts in fictitious names.[90] Whereas that may be true and each individual bank may have had its own guidelines for opening accounts, in the absence of any legal prohibition, the possibility of opening anonymous accounts did exist. This problem was more chronic in the OFSS where the laws by implication encouraged the opening of anonymous accounts. It was evidently the position under the IBA 1996 where it was provided that:

> *"For the purposes of subsection (3), the Offshore Finance Inspector shall have access to the name or title of an account of a depositor and any other confidential information about or in the possession of a licensee only pursuant to an order of the court made under the circumstances set forth in the Confidential Relationship Preservation (International Finance) Act 1996 on the ground that there is no other way to obtain the information required."*[91]

The subsection (3)[92] to which the aforesaid section referred empowered the Offshore Finance Inspector to have access to books and records of any licensee and to request

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[87] Criterion 4- ***"Existence of Anonymous accounts or accounts in obviously fictitious names."***

[88] **Criterion 5** ***-Lack of effective laws, regulations, agreements between supervisory authorities and financial institutions of self regulatory agreements among financial institutions on identification by the financial institution of the client and beneficial owner of an account:***

> ***-no obligation to verify the identity of the client;***
> ***- no requirement to identify the beneficial owners of where there are doubts as to whether the client is acting on his own behalf;***
> ***- no obligation to renew identification of the client or beneficial owner when doubts appear as to their identity in the course of business relationships;***
> ***-no requirement for financial institutions to develop ongoing anti-money laundering training programmes.***

[89] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 3

[90] Response of Government Of St. Vincent and the Grenadines To Report On St. Vincent and the Grenadines Against The 25 Criteria For Assessing Non- Cooperative Countries, 6th May, 2000, p7

[91] Section 13(4)

[92] Section 13(3) of the IBA 1996 provided as follows:

> *"In the performance of his functions under this Act and subject to the confidentiality provisions in this Act and elsewhere under the laws of the State, the Offshore Finance Inspector may at all reasonable times and solely for the purpose of carrying out the requirements of this Act and at the reasonable requests and directions of the Authority-*
> *(a) have access to books, records, vouchers, documents cash and securities of any licensee;*

any information that confirmed or denied that the licensee contravened the IBA 1996. However, once the enquiry pertained to accessing the identity of account holders, an Order was required from the court in accordance with the circumstances prescribed under Section 4 of the Confidential Relationships Preservation (International Finance) Act ('CRPA') 1996 which provided:

> *"Whenever a person intends or is required to give evidence in or in connection with, any proceeding being tried, inquired into, or determined by any court, tribunal or other authority (whether within or outside of the State) of any confidential information within the meaning of this Act, he shall before so doing apply for and await directions from the court."*

Essentially, the order, may only have been granted if the information required was to be used as evidence in a court proceeding or any similar tribunal. This was indeed a stringent restriction on the Inspector of international banks. Moreover, it did not sit easily with the anti-money laundering pronouncements that were made by parliamentarians during the parliamentary debate on the International Banks Bill 1996 (see above). The existence of the possibility that anonymous and fictitious accounts could have been established with the international banks required urgent attention. It may not have been proportionate to blacklist SVG and decry such a deficiency. Further dialogue may well have achieved better results. The FATF encountered this deficiency before when Austria (one of its member territories) failed to comply with Recommendation 10[93] of the FATF's 40 Recommendations, by refusing to abolish

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> *(b) request any information, matter or thing from any person who it has reasonable grounds to believe is carrying on an offshore banking business in the State in contravention with this Act; and*
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> *(c) demand of the Registered Agent of a licensee any reasonable information or explanation as to the offshore banking business being conducted by a company for which it serves as Registered Agent, for the purpose of enabling the Authority and the Minister to perform its functions under the Act;*
>
> *but in no event, except as expressly provided by law, may the offshore finance inspector or the Authority or any person or entity acting under or with either of them, remove, communicate, send or in any manner transmit any such information, documents, or related material out of the State."*

[93] FATF Recommendation 10 *"Financial Institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements, between supervisory authorities and financial institutions or by self regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying documents, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening up of accounts or passbooks, entering into fiduciary transactions, renting of safety deposit boxes, performing large cash transactions). In order to fulfil identification requirements concerning legal entities, financial institutions should, when necessary, take measures: (1) to verify the legal existence and structure of the customer by obtaining either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form address, directors and provisions regulating the power to bind the entity: (11) to verify that any person purporting to act on behalf of the customer is so authorised and identify that person."*

anonymous passbooks for Austrian residents.[94] Rather than invoking Recommendation 21[95] immediately, Levi and Gilmore stated that:

> *"The president first wrote to the Austrian Government about this matter, but when this did not lead to change, a high level mission was dispatched to Vienna without success. The task force invoked Recommendation 21…"*[96]

It was as a result of this diversity of treatment of countries that the FATF's anti-money laundering initiative was seen as lacking fairness. Peith has also observed the inconsistency of the approach that is taken with non-member countries and territories as compared with FATF member countries when he stated that;

> *"It is, however, significant that the FATF was not really in the position to give more detailed guidance between 1990 and 1999 on customer due diligence. All the excitement about the Non-Cooperative Countries and Territories process, the blacklisting and partial delisting of so called 'NCCTs,' has overshadowed the fact that many FATF core- members were not ready to implement even basic customer due diligence standards at the levels already defined in the 1990 recommendations."*[97]

4.5.1 Criterion 5[98]

Non-bank financial institutions, for example, Cooperative Societies and Building Societies, contrary to the FATF's findings, do have legal requirements for customer identification. Only members[99] were permitted to be customers of those Societies.[100]

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[94] Levi M and Gilmore W., "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" in Peith's M., "Financing Terrorism" 2002 Kluwer Academic Publishers, 2002 at pp 100-101.

[95] FATF Recommendation 21: *"Financial Institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies."*

[96] Levi M and Gilmore W., "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" in Peith's M., "Financing Terrorism" 2002 at pp. 100-101.

[97] Peith M., "Financing Terrorism: Following the Money" in Peith M., "Financing Terrorism" 2002 at p. 122.

[98] **Criterion 5 *-Lack of effective laws, regulations, agreements between supervisory authorities and financial institutions of self regulatory agreements among financial institutions on identification by the financial institution of the client and beneficial owner of an account:***

> ***-no obligation to verify the identity of the client;***
>
> ***- no requirement to identify the beneficial owners of where there are doubts as to whether the client is acting on his own behalf;***
>
> ***- no obligation to renew identification of the client or beneficial owner when doubts appear as to their identity in the course of business relationships;***
>
> ***-no requirement for financial institutions to develop ongoing anti-money laundering training programmes.***

[99] Section 2 of the Cooperative Societies Act 1999 defined a member to include *"…a person or registered society joining in the application for the registration of a society, and a person or registered society admitted to membership after registration in accordance with this Act and by-laws."*

Obtaining membership included a process of identification such as ascertaining the prospective member's name, address, occupation, date of birth and a recommendation from an existing member. The process of membership also entailed the issuance of registered (not bearer) shares to members.[101] Those share certificates provided evidence of membership. Effectively, there was no other way of determining who was a member of those Societies unless a process of customer identification was initiated. Deposits to and withdrawals from accounts that were held by those societies were only permitted with the authority of the members who were the account holders. Those transactions were effected only if the signature of the member could be authenticated by the staff of the Societies. Essentially, a signature must accompany a name and an address must be attached to the name for communication purposes. If this information was not held by the Societies then it is difficult to imagine how they could have a register of members as

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Section 2 also defined a registered society to mean *"...a cooperative society registered under this Act*

[100] Section 12(1) of the Cooperative Societies Act 1999 provided that:

"No Society may be registered or having been registered continued to be registered under this Act unless-
(a) ***its membership consists-***
(i) in the case of financial cooperatives, of not less than fifty members, and
(ii) in the case of any other cooperative of not less than ten members..."

Section 23(1) provided: *"An application for membership of a society shall be submitted to the Board in such form as the Board approves."*

Section 10(1) provided that: *"A registered society shall include in its by-laws provisions-*
(a) respecting conditions of membership, including-
(i) the rights of joint members, if any,
(ii) the qualification for membership and the withdrawal of members and transfer of membership;"

Section 4 of the Building Societies Act Cap 324 of the 1990 Revised Laws of St. Vincent and the Grenadines provided that: *"Any number of persons may establish a society under this Act, either terminating or permanent for the purpose of raising by* ***subscriptions of the members*** *stock or fund for making advances to members out of the funds of the society...*

Section 26 of the Building Societies Act Cap 324 of the 1990 Revised Laws of St. Vincent and the Grenadines provided that: *"Any person under the age of eighteen years may be admitted* ***as a member of a society*** *under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances.*

[101] Section 4 of the Building Societies Act Cap 324 of the 1990 Revised Laws of St. Vincent and the Grenadines provided that: *"...And any society under this Act shall, so far as is necessary for the said purpose, have power to hold land, with the right of foreclosure and may raise funds by* ***issue of shares*** *of one or other denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purpose of the society..."*

Section 5 also provided that: *"The liability of* ***any member of any society*** *under this Act in respect* ***of any share*** *upon which an advance has been made shall be limited to the amount actually paid or in arrear on such share, and in respect of any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society."*

Section 10(1)(a)(v) of the Cooperative Societies Act 1999 provided that: *"A registered society shall include in its by-laws provisions respecting conditions of membership, including...the* ***minimum value of shares*** *that may be held by each member."*

prescribed by law,[102] issue shares in the names of its members, issue loans to its members and carry out other financial transactions on behalf of its members.

There is very little, if any, difference between the long standing practices and traditions of the Societies and any legislation that would include such practices and traditions. What really mattered was that those practices and guidelines were implemented. There was no evidence that enacting such practices and traditions would ensure greater adherence. In any event the human element would dictate whether those practices and traditions were implemented, irregardless of whether they were enacted or not. The FATF in relation to the identification procedures of domestic commercial banks expressly indicated that *"...the CFATF mutual evaluation indicates that these requirements have not been effectively implemented"*[103] To the extent that such was an accurate assessment of the evaluation process then this deficiency should have been discovered and addressed by the ECCB during its examination of domestic commercial banks. However, it would appear that the alleged ineffective implementation of the customer identification requirements by domestic commercial banks could well have been due to the inefficiency of responsible employees which no doubt could have been remedied by closer supervision of senior officers of the respective banks. Accordingly, in so far as customer identification procedures were concerned, there were mechanisms in place both in the banking and non-banking financial institutions to identify beneficial owners of accounts.

The FATF under Criterion 5 further concluded *"...Nor is there any regulation regarding the identification of beneficial owners in the offshore licensed institutions."* [104]To the extent that this conclusion related to international trusts and IBCs, it was correctly stated, although to a lesser extent with regard to international trusts. It was however, otherwise incorrect. The other entities that were registered, licensed and operated within the OFSS were international banks, international trusts, international insurances and mutual funds. The inaccuracy of the FATF's conclusion as it related to international banks had already

[102] Section 18(2) (c) of the Cooperative Societies Act 1999 provided that: *"Without prejudice to subsection (1), there shall be made available at all reasonable times at the registered office of the society...the register of members."*
[103] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 3
[104]FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 3

been demonstrated in the discussion above, under criterion 3. The same will be argued for those entities that were registered under the other offshore legislation.

4.5.1.1 *International Trusts*

The International Trust Act (ITA) 1996 defined an international trust as:

"...a trust in respect of which

> *(i) the settlor is not a resident at the time of the creation of the trust and at such times as the settlor adds new property to the trust*
> *(ii) the trust is evidenced by a writing signed by the settlor or his nominee and a Registered Trustee,*
> *(iii) at all times at least one of the trustees is licensed under the Registered Agent and Trustee Licensing Act,*
> *(iv) no beneficiary is a Resident at the time of the creation or settlement of the trust or at such times as the settlor adds new property to the trust, and*
> *(v) the trust property does not include any real property situate in the State or an interest in any property so situate.*[105]

By prescribing the characteristics of an international trust, the ITA 1996 had imposed upon the Registrar of Trust ("Registrar") a duty to ascertain the residency status of the settlor and beneficiary at the time that the trust was created. Moreover, it also required that their must be written documentation which contained the signature of the settlor or his nominee. In order to effectively carry out this duty the Registrar was required to know the identity of the settlor and the beneficiary. By requiring a nominee to sign on behalf of the settlor was indeed problematic, since the signature of the settlor, which may well have been an important form of identification, may have been absent. Nonetheless, the duty to determine the identification of the settlor was undoubtedly imposed on the Registrar by law. A different picture would however emerge if the settlor was an IBC.

Under the ITA 1996 a settlor was defined as *"a person who makes a disposition of property on or to a trust."*[106] A person was further described by the Act as *"a natural person or a company, partnership, limited partnership or other body corporate."*[107] Therefore, under the ITA 1996 a company could have been a settlor. Apart from the obligation to ascertain that the settlor was not resident at the time that the trust was created or any dispositions were made to the trust, the ITA 1996 did not expressly impose further obligations on the

[105] Section 2
[106] Section 2
[107] Ibid

Registrar to ascertain the identity of the beneficial owners of a corporate settlor. Nonetheless, a duty was imposed on the Registrar to secure the signature of the settlor. Where the settlor was a company, the signature should have been that of a director[108] or a secretary.[109] In this way the Registrar would have been in a better position to ascertain who comprised the management of the IBC but may still have been oblivious to the identity of the true owners since no duty was imposed by the ITA 1996 to obtain their signatures.

A major problem arose when either or both the settlor and the beneficiary[110] were IBCs. As in the case of the settlor, the ITA 1996 did not impose any obligation on the Registrar to ascertain the identification of the corporate beneficial owner of the trust. This was a particularly significant omission, especially when, as noted above, IBCs were permitted to have bearer shares. It was therefore very easy for criminals to hide behind bearer shares IBCs in order to become settlors and or beneficiaries of what initially appeared to have been a perfectly legal structure. Although the IBCs could have been incorporated and registered at the OFA in SVG they would not have been considered to be resident[111] for the purposes of international trusts. This meant that the

[108] John Shaw & Son (Salford) Ltd v Shaw [1935] 2 KB 113 at 134 per Greer LJ, CA: *"A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by its directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of these powers vested by the articles in the directors is by altering the articles, or...by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."*

[109] Panorama Developments (*Guilford*) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 3 All ER 16 (CA) as per Lord Denning - *"...A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Act, but also by the role which he plays in the day to day business of the company and enters into contracts on its behalf which come to within the day to day running of company's business. So much so that he may be regarded as held out as having the authority to do such things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff and ordering cars, and so forth. All such matters come within the ostensible authority of a company secretary."*

[110] Section 2 of the ITA 1996 defined beneficiary as: *"..a person entitled to benefit under a trust, or in whose favour a power to distribute trust property may be exercised, and includes a body corporate.."*

[111] Section 2 of the ITA 1996: *"Residency means, for the purposes of this Act,*

(1) a natural person who is ordinarily resident in the State under general principles of State income taxation,

(2) any trust, company, partnership, limited partnership, or other body, incorporated, established, formed or organised in the State under the laws of the State, the majority of shares, beneficial interests or other indica of ownership of which is legally or beneficially owned, directly or indirectly, by persons who are resident under the provisions of subparagraphs (1) and (3) hereof, or by the State, or

qualification that the settlor or beneficiary should not be a resident, did not apply to IBCs. Accordingly, in situations where either the settlor or the beneficiary or both were IBCs there was no legal obligation to ascertain the identity of the beneficial owner. This anomaly in the law warranted some remedial attention from the SVG government.

4.5.1.2 *International Insurance*

Under the International Insurance Act (IIA) 1998, an applicant had a choice of five classes[112] of insurance licenses from which to choose, depending on the type of insurance business that the applicant intended to operate (see chapter 3.11.4). Pursuant to Section 14 of the IIA 1998:

> *"An application for a license under this Act shall be made in writing to the Commissioner in the form and containing information as may be prescribed in the regulations..."*

The regulations to which the Act referred were the IIR 1999. Regulation 4(1) provided that; *"...Every application for a license to carry on international insurance business made pursuant to section 14 of the Act shall be made on Form AIL, the form of which is set out as*

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(3) *any other trust, company, partnership, limited partnership or other entity, which is a resident of, or ordinarily resident or domiciled in, the State under the Income Tax Act Cap 312;*
provided for the purposes hereof the term "Resident" shall not include (i) any charity under the charities Act Cap –(ii)any International Trust that complies with the tax exemption provisions of the Act, or if registered under the Trust Authority Act, the tax exemption provisions of that Act; (iii) any international business company that complies with the tax exemption provisions of that Act...so long as and to the extent that such compliance continues by such entity under the provisions of the applicable Act;

[112] Section 12(1) of the IIA 1998 provided as follows: *"A person intending to carry on an international business in or from within the State, may make application under this Act for one of the following Classes of license which, if issued to the person as provided in this Act, shall allow that person to carry on the form of international insurance business described in such license so long as such license shall be in effect:*

(a) *Class I Unrestricted License permits the insurer to carry on any international insurance business, including long term insurance business.*
(b) *Class II General License permits the insurer to carry on general international insurance business, but not long- term international insurance business.*
(c) *Class III Association License permits the insurer to carry on general international insurance business and long-term international insurance business, with two or more owners of the insurer, and their affiliates, and to carry on no more than thirty percent (30%) of its international insurance business (based on net premiums) with persons who are not owners of the insurers or their affiliates.*
(d) *Class IV Group License permits the insurer to carry on any international insurance business, including long-term international insurance business, with a single owner of that insurer and its affiliates, and employees of the owner or its affiliates.*
(e) *Class V Single License permits the insurer to carry on any international insurance business, including long-term international insurance business, with the sole owner of the insurer, if a company, or with the beneficial owners of the insurer, if a trust."*

Exhibit I to these regulations." Additionally, Regulation 4(3) provide that "*...Every Director, controller, Manager and/or Promoter (as such terms are defined in Form PQ) of a person that applies for a license under the Act or who submits an application for consent to register under Section 15 of the Act must complete and submit to the Commissioner, along with application for a license or consent, a Personal Questionnaire, which shall be made on Form PQ, the form which is set out as Exhibit 3 to these regulations.*"

Essentially, every applicant for an insurer's license, irrespective of the choice of license being sought, was required to complete Form AIL and Form PQ. The Form AIL required information to be submitted about the names and addresses of all directors, shareholders and officers and managers. The Form PQ on the other hand, required quite a lot of personal information about those who were controllers or prospective controllers of the applicant, including their names, addresses and nationalities. Both forms also required information on the reputation and character of the beneficial owners, directors and officers and managers of the applicant. Interestingly, paragraph 6 of the Form PQ provided that, "*neither the UK Rehabilitation of Offenders Act 1974 nor any analogous legislation of other countries applies.*" What this meant effectively was that no insurer's licence would have been issued to an applicant whose senior manager or controller was convicted of an offence. The period of time since the conviction, was irrelevant.

The IIA 1998 also provided that the Commissioner of Insurance should be notified about any changes to the particulars that were submitted along with the application for the license.[113] Regulation 4(9)[114] of the IIR 1999 imposed an additional responsibility on the insurer to seek approval for any changes that it implemented. It also referred to a letter which required the insurer to notify the Commissioner of the changes that were made and to seek the approval of the Commissioner for those changes. In this way, any attempt to include a criminal into the insurance business operations subsequent to the acquisition of the license, was effectively thwarted by Section 22(3) of the IIA 1998 and Regulation 4(9) of the IIR 1999, since the Commissioner's approval of the change was mandatory.

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[113] Section 22(3) of the IIA 1998 provides that; "*An insurer may only carry on an international insurance business in accordance with and based upon the information contained in its original application for a license, as an insurer and shall forthwith provide notice to the Commissioner of any material change in such information, in the form provided in the regulations.*"

[114] "*Pursuant to Section 22(3) of the IIA 1998, insurers are under a continuing duty to inform the Commissioner of changes in information contained in any filing made under the Act or these regulations. Insurer shall promptly notify the Commissioner of any such change on Form NCP, Notice of Change of Particulars, the form of which is set out in Exhibit 12, to these regulations*"

4.5.1.3 *Mutual Fund*

The Mutual Funds Act (MFA) 1998 provided for the registration of three types of Mutual Funds; the Public Fund, the Private Fund and the Accredited Fund (see chapter 3.13). The Accredited Fund was also considered to be a Private Fund and in that regard shared an identical registration procedure. Regulation 10 of the MFR 1999 required a Public Fund to submit an application for registration on Form RPF and Form PQ. Whereas Form RPF focussed on the information required about the prospective fund, Form PQ concentrated on personal details concerning the directors, controllers, promoters and officers and managers. The information required under the Form PQ used in an application for an international insurer's license was identical to that required under the Form PQ for a Public Mutual Fund. Therefore, the arguments that were proffered for the international insurance and which directly related to the Form PQ are equally relevant for the Public Mutual Fund. Essentially, Regulation 10 of the MFR 1998 instituted a procedure for identifying the promoters, directors, controllers, and managers of the Public Fund.

Although an application for a Private Fund (which included Accredited Funds) required the submission of information about the prospective Fund on the application form, PAF, it did not require the submission of personal details on a Form PQ. Accordingly, there was no legal requirement for the Registrar of Mutual Funds to ascertain the identities of the owners and managers of a Private Fund. The fundamental difference between a Private Fund and a Public Fund was that private individuals could have pooled their resources for investment purposes but the Fund was not authorised to request subscriptions from the public at large as could the Public Fund. Therefore, the Public Fund required greater legislative attention, especially for the protection of investors.

The absence of legislative provisions for the identification of owners and managers of Private Funds pervaded the Private Fund market and was in evidence in the legislation of other jurisdictions that were reviewed by the FATF and not blacklisted.[115] This did not however, justify the absence of procedures to identify owners and managers of Private Funds. What was however equally crucial was the need to ensure that the

[115] See the British Virgin Islands and Bermuda.

sources of the funds that were received for investment purposes were legitimate and lawful. There needed to have been a legislative imposition of responsibility on the managers and administrators of Funds to identify the persons from whom the monies were received. If the absence of such identification procedures did not warrant the blacklisting of countries or territories that were culpable then on that basis the blacklisting of SVG could not have been justified. It is also noteworthy that the OFA conducted due diligence on the owners and managers of the applicants for financial institutions. Incidentally, no international insurance or mutual fund licenses were granted when the FATF's review was conducted and at the time of the blacklisting of SVG.

4.6 Criterion 6[116]

The FATF concluded that SVG fell within this criterion. In that regard it stated that, "*...no legal requirement nor prudential guidelines have been issued to non-bank financial institutions relating to record keeping. There is also a lack of regulation in that respect applicable to offshore financial institutions (including offshore banks).*"[117] Once again the FATF's conclusions were wrong. There was legislation which provided for the retention and maintenance of records in the non-bank and offshore financial institutions since 1979 and thereafter. Section 86 of the Income Tax Act (ICTA) 1979 (or Cap 312 of the 1990 Revised Laws of St. Vincent and the Grenadines) required every person carrying on any business to maintain [118] and preserve[119] proper records or books of accounts which reflected the operations of the business. Section 2 of the ICTA 1979 defined a person to include "*an individual, a trust, the estate of a deceased person, a company, a partnership and every other juridical person.*" The section did not make any distinction between onshore companies and offshore companies. Neither did any of the offshore

[116] Criterion 6: ***"Lack of a legal or regulatory obligation for financial institutions or self-agreements among financial institutions to record and keep, for a reasonable and sufficient time (five years), documents connected with the identity of their clients as well as records on national and international transactions.***

[117] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. pp 3-4

[118] Section 86(1) (Cap 312 of the 1990 Revised Laws of St. Vincent and the Grenadines) provided that: "*Every person carrying on any business shall keep, in the English Language, such records or books of accounts as are necessary to reflect the true and full nature of the transactions of the business, regard being had to the nature of the activities concerned and the scale on which they are carried out.*"

[119] Section 86(4) (Cap 312 of the 1990 Revised Laws of St. Vincent and the Grenadines) provided that: "*Subject to subsection (5) and (6), every person to whom this section applies shall preserve all books and of account and other records which are essential to the explanation of any entry in such books of account of that business for a period of seven years after the end of the basis period to which such books of account or records relate.*"

laws exclude the application of the ICTA 1979. The ITA 1996,[120] IBC Act 1996,[121] IBA 1996,[122] IIA 1998[123] and MFA 1998[124] exempted their respective entities from income tax provided certain conditions were met but did not exclude the ICTA 1979 altogether. It is however important to note that pursuant to Section 16(1) of the International Companies Act 1982 the Comptroller of the Inland Revenue Department was empowered to request from a local representative information about an international company so that the Comptroller could determine whether the company is entitled to the tax exemption under the International Companies Act. Pursuant to Section 113 of the IBC Act 1996[125] companies that were registered under the former ICA 1982 were allowed to exist under the former Act for a maximum of five years after the effective date of the IBC Act 1996. By the date of the FATF's review and blacklisting over two thousand former Act companies were still to be continued under the new IBC Act.[126] Therefore, in the event that any offshore entity failed to comply with the conditions for income tax exemptions, they immediately fell to the incidence of tax. Therefore, Section 86 of the ICTA 1979 applied to offshore entities, as well.

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[120] Section 62 (1) ITA 1996 provided that: *"Notwithstanding any provision to the contrary contained in the Income Tax Act Cap 312, all income, profit or gain realised or received by a trust or any beneficiary of a trust shall not be subject to income tax by the State..."*

[121] Section 99(1) of the IBC Act 1996 provided that: *"Notwithstanding any provision of the Income Tax Act-*

(a)An international business company which complies with this Act shall not be subject to any corporate tax, income tax, withholding tax, capital gains tax or other like taxes based upon or measured by assets or income originating outside the State or in connection with matters of company administration which may occur in the State."

[122] Section 20(1) of the IBA 1996 provided that: *"No income tax capital gains tax or other direct tax shall be levied by the State or any political subdivision upon the profits or gains or earnings of a licensee in respect of its offshore banking business."*

[123] Section 48(1) of the IIA 1998 provided that: *"Notwithstanding any provision or rule of law in the State to the contrary-*

(a) an insurer which holds a valid and subsisting license in any class under this Act shall not be subject while such license is in effect to any corporate tax, income tax, withholding tax, capital gains tax or other like taxes based upon or measured by assets or income originating outside the State or in connection with matters of administration or management which may occur or be performed in whole or in part in or from within the State;"

[124] Section 39(1) of the MFA 1997 as substantially amended in 1998 provided that: *"Notwithstanding any provision or rule of law in the State to the contrary-*

(a) An mutual fund which holds a valid and subsisting license in any class under this Act shall not be subject while such license is in effect to any corporate tax, income tax, withholding tax, capital gains tax or other like taxes based upon or measured by assets or income originating outside the State or in connection with matters of administration or management which may occur or be performed in whole or in part in or from within the State;"

[125] Section 113(1) of the IBC 1996 provided as follows: "*Subject to the remaining provisions of this section and of section 112, and notwithstanding the provision of section 71 of this Act, a company incorporated and in good standing under the former act may continue in existence for a period of five years after the effective date of this Act so long as such company continues to comply with the provisions of the former act. At the end of such five year period any company that has not been continued under this Act or otherwise dissolved or wound-up shall be struck from the former Register of International Companies."*

[126] From the records at the Offshore Finance Authority.

Chapter 4. "An Evaluation of the Reasons for the Blacklisting of SVG by the FATF."

The FATF accepted that the 1995 ECCB Guidance Notes required onshore banks to maintain record keeping for a minimum period of 5 years.[127] It also concluded that Section 30 of the DTOA 1993 required banks to retain for different periods, documents relating to the opening of accounts and accounts operations but failed to acknowledge that those requirements also extended to non-bank and offshore financial institutions.[128] Why did the FATF conclude that Section 30 only related to onshore banks when the DTOA 1993 clearly stated otherwise? An appreciation of the definition of financial institutions may well clarify the fallacy of the FATF's conclusion. Section 32 of the DTOA 1993 defined financial institutions as follows:

> *"For the purposes of Sections 30 and 31 of the Act*
> *(a) a bank licensed under the Banking Act;*
> *(b) any financial institution of whatever kind registered, licensed or otherwise regulated by any Act contained in Title V of the Revised Edition of the Laws;*
> *(c) a trust company, finance company or deposit taking company, recognised by the Minister responsible for Finance as such."*

Offshore Banks and non-banking financial institutions clearly did not fall under Sections 32(a) and (b). Section 32(a) referred to the Banking Act which effectively was the Banking Act Cap 63 of the 1990 Revised Laws of St. Vincent and the Grenadines. That Act regulated the domestic (onshore) banking activities. The Title V to which Section 32(b) referred listed 17 Acts[129] which regulated the activities of financial institutions. The Banking Act Cap 63 was included on that list but none of the Acts regulated the activities of non-bank and offshore financial institutions. The major issue for consideration is whether Section 32(c) referred to non-bank and offshore financial institutions. This section accorded to the Minister of Finance the discretion to determine which institutions should be categorised as financial institutions for the purposes of the DTOA 1993. In making such a determination and before exercising the discretion, the Minister of Finance needed to appreciate the characteristics of a financial institution within the context of the requirements of the law.

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[127] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 3

[128] *Ibid*

[129] The list of Act as were: Agricultural and Cooperative Bank St. Vincent and the Grenadines; Agricultural and Cooperative Bank (Merger with Development Corporation); Alien Banks; Bank Undertaking (The Royal Bank of Canada Saint Vincent and the Grenadines Operations) Vesting; Banking; Banks (Special Deposits); Caribbean Development Bank; Caribbean Investment Corporation; Development Corporation; Eastern Caribbean Central Bank; Hayward Agriculture Credit Bank; Housing and Land Development Corporation; International Financial Organisations; Land Settlement and Development Board (Dissolution and Transfer of Property and Functions); Saint Vincent and the Grenadines Agricultural Development Corporation (Dissolution and Transfer of Assets and Liabilities); Saint Vincent and the Grenadines Marketing Corp; Savings and Deposit Banks.

Accordingly, Section 32 referred to Sections 30 and 31 in determining the meaning of financial institutions. Pursuant to Section 30 a financial institution was required to retain documents that related to financial transactions carried out by the institution for certain periods, depending on the transaction for which the document was retained.[130] The relevant provisions of Section 31 on the other hand pertained to the release of documents and the maintenance of the registry for the documents that were retained.[131] The transactions to which Section 30 referred related to the opening and closing of accounts and safety deposit boxes, the transfer of funds and applications for loans. Moreover, during the debate of the Drug Trafficking Offences Bill 1993 in the House of Parliament, the Attorney General in presenting the Bill stated that:

> *"The Bill confers power to require the production of documentary material relevant to investigations being made by the police into drug trafficking and money laundering offences; requires banks and other financial institutions to keep and preserve records of financial transactions..."*[132]

That was the only mention of the phrase "financial institutions" throughout the entire debate. It was however interesting to note that the Attorney General referred to banks.

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[130] Section 30 of the DTOA 1993 provided as follows: *"(1)Subject to this section, and to section 31, a financial institution shall retain, in its original form for the minimum retention applicable to the document,*

> *(a) a document that relates to a financial transaction carried out by the institution in the capacity as a financial institution and, without limiting the generality of this, includes a document that relates to*
>
> > *(i) the opening or closing by a person of an account with the institution;*
> > *(ii) the operation by a person of an account with the institution;*
> > *(iii) the opening or use by a person of a deposit box held by the institution;*
> > *(iv) the telegraphic transfer of funds by the institution on behalf of a person to another person;*
> > *(v) the transmission of funds between this State and a foreign country or between foreign countries on behalf of a person; or*
> > *(vi) an application by a person for a loan from the institution, where a loan is made to the person pursuant to the application; and*
>
> *(b) a document that relates to a financial transaction carried out by the institution in its capacity as a financial institution that is given to the institution by or on behalf of the person, whether or not the document is signed by or on behalf of the person.*

(2) For the purposes of this section, the expression "minimum retention period" means-

> *(a) Where the document relates to the opening of an account with the institution, the period of 7 years after the day on which the account is closed;*
> *(b) Where the document relates to the opening by a person of a deposit box held by the institution, the period of 7 years after the day on which the deposit ceases to be used by the person; and*
> *(c) in any other case, the period of 7 years after the day on which the transaction takes place."*

[131] Section 31 of the DTOA 1993 provided that: *" (1) Where the financial institution is required by law to release the original of a document before the end of the minimum retention period applicable to the document, the institution shall retain a complete copy of the document until the period has ended or the original document is returned, whichever occurs first.*
(2) A financial institution shall maintain a register of documents released under subsection (1)"

[132] St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993 p 27

He did not distinguish between offshore and onshore banks. This was indeed understandable since the Act related to both the onshore and offshore sectors in the country.[133] When the extract from the Attorney General's presentation coupled with the requirements in Section 30 of the DTOA, 1993 were taken together, it was clear that an offshore bank, and for that matter any institution that opened or closed accounts and effected transfers into and out of those accounts, could be considered to be a financial institution. Accordingly, insurance companies (onshore and offshore), mutual funds, international banks, building societies and cooperative societies together with domestic banks were all placed into the category of entities that were financial institutions. Mutual Funds were permitted to take deposits and execute withdrawals. Insurance companies took deposits and issued loans and so did Building Societies and Co-operatives. Not only was it abundantly clear that those entities were financial institutions, there was no doubt that they, by extension, fell within the ambit of the DTOA 1993, contrary to the conclusion of the FATF. Moreover, four years later, the PCA 1997 maintained the same retention periods for documents that were generated as a result of financial transactions that were effected by financial institutions. The wording of that section was *pari materia*[134] with Section 30 of the DTOA 1993.

On the basis of the foregoing, there was an abundance of legislation that regulated the maintenance and preservation of records and books of accounts related to financial transactions. The FATF obviously did not consider it necessary to review them or seek clarification. If it had done, a more favourable conclusion would have been drawn from their evaluation of SVG's efforts to eradicate money laundering. The FATF's findings exemplified the perfunctory manner in which the review was conducted and the inaccuracies that pervaded the entire Report. This approach undoubtedly vitiated an otherwise plausible initiative against crime and emphasised the unfortunate insidious nature of the initiative and its attack on offshore financial services.

[133] The DTOA Act 1993 was cited as: *"An Act to make provision for the recovery of the proceeds of illicit drug trafficking and for matters connected therewith or incidental thereto."* Note that the Act did not restrict its application to any sector in the country and therefore all transactions in the country relevant to the Act were governed by the Act.

[134] Section 72(1) of the PCA 1997 provided that: *"This Act is pari materia with the DTOA, 1993 and notwithstanding the provisions of section 5(a) of the Drug Trafficking Offences Act 1993, the provisions of section 15 relative to the penalty for the enforcement of fines shall apply to this Act."*

4.7 Criteria 10[135] and 11[136]

These criteria relate to the mandatory reporting of suspicious or unusual transactions and the lack of any criminal or administrative sanctioning mechanism for non-compliance. Suspicious transactions reports (STRs) provide vital pieces of evidence[137] which enable law enforcement agencies to detect criminal conduct at the placement stage[138] of the money laundering process and monitor the activities of those who are suspected to be involved in criminal conduct. The size and frequency or even infrequency of transactions may give rise to further questions concerning the source of funds, answers to which may provide very crucial links between licit and illicit transactions or vice versa. The absence of a STRs mechanism increases the chances of a jurisdiction being used as a facilitator of the money laundering process. Moreover, such absence restricts the flow of information between law enforcement agencies and impedes the chances of apprehending and bringing to justice those involved in money laundering and its predicate offences.

The FATF concluded that SVG fell within criteria 10 and 11. The issue that requires serious consideration is whether SVG had in place an efficient and mandatory system of reporting dubious transactions. In that regard the FATF issued the following statement.

> *"Notwithstanding the already mentioned ECCB Anti-Money Laundering Guidelines Notes (applicable only for domestic banks), there is currently no efficient nor mandatory system in St. Vincent and the Grenadines requiring onshore financial institutions to report suspicious financial transactions. There is also no requirement to report suspicious financial transactions applicable to offshore financial institutions."*[139]

It will however be argued that generally, SVG has in place an efficient and mandatory transactions reporting system.

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[135] **Criterion 10:** ***"Absence of an efficient mandatory system for reporting suspicious or unusual transactions to a competent authority, provided that such a system aims to detect and prosecute money laundering."***
Criterion 11: ***"Lack of monitoring and criminal or administrative sanctions in respect to the obligation to report suspicious or unusual transaction."***
[137] Stessens G., "Money Laundering, A new international enforcement model," Cambridge, 2000, p 159 where Stessens referred to suspicious transactions reports as *"...one of the pillars of the preventative anti-money laundering system"*
[138] See Chapter 2.4.1
[139] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 4

Under the DTOA the reporting of suspicious transactions was not solely restricted to the domestic financial services sector. It included the OFA as well. The preamble of the DTOA 1993 provided that the DTOA was; "*An Act to make provision for the recovery of the proceeds of illicit drug trafficking and for matters connected therewith or incidental thereto.*" The reporting mechanism under the DTOA was drafted in the passive tone as opposed to the active tone and therefore did not impose any obligation to report. For example section 21(3) of the DTOA provided that:

> *"Where a person discloses to a police officer of the rank of Inspector or above a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based..."*

Section 21(3) was in effect an encouragement to those, to whom persons involved in drug trafficking turned for assistance.[140] The section essentially absolved persons who assisted the drug trafficker, from the commission of a criminal offence under section 21 of the DTOA, provided that the offence was reported to the police as soon as it was reasonable for the person to do so or where the act was carried out with the consent of the police.[141] The reach of the DTOA was limited for two reasons. Firstly, it only related to drug trafficking offences and offences incidental thereto. Secondly, there was no legal obligation to report such offences and accordingly no penalties were imposed for non-disclosure but it served as a timely reminder that failure to report could have led to

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[140] Section 21(1) of the DTOA 1993 provided as follows: *"Subject to subsection (3), any person who, after the date of the coming into operation of this Act enters into or is otherwise concerned in an arrangement whereby –*

(a) the retention or control by or on behalf of any other person, in this section referred to as "A," of proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or to otherwise); or

(b) "A's" proceeds of drug trafficking are used –

(i) to secure that funds are placed at "A's" disposal or

(ii) for "A's" benefit to acquire property by way of investment,

knowing of believing that "A" is a person who carries on or has carried on drug trafficking or has anytime received any payment or other reward in connection with drug trafficking carried on by him or another, is guilty of an offence."

[141] Section 21(3) of the DTOA1993 provided that: *"Where a person discloses to a police officer of the rank of Inspector or above a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based-*

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any law; and

(b) if he does any act in contravention of subsection (1)and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made –

(i) before his does the act being an act done with the consent of such Police Officer; or

(ii) after he does the act, but was made on his initiative and as soon as it was reasonable for him to have made it."

convictions for having assisted the drug trafficker pursuant to Section 21(1)[142] and/or Section 22(1)[143] of the DTOA 1993 and those offences carried harsh penalties.[144]

Section 21(3) of the DTOA, was a deterrent to those who contemplated assisting the drug trafficker. It criminalised any arrangement in circumstances where those involved knew or believed that the arrangement involved the proceeds of crime or that there was no reasonable excuse for not disclosing the matter to the police.[145] Moreover, it also criminalised those who assisted in disguising, concealing transferring or converting the proceeds of crime to avoid prosecution or the enforcement of a confiscation order. In essence, it afforded those who knowingly assisted[146] the drug trafficker, the opportunity to gain reprieve by disclosing to the police their suspicion or belief that funds were 200derived from or used in connection with drug trafficking. It criminalised those who may have facilitated drug trafficking or money laundering and failed to report their suspicions, thus effectively encouraging the reporting of suspicious transactions. Given that globally, drug trafficking accounted for a disproportionate amount of the monies laundered,[147] Section 21(3), even though its governance was restricted to drug trafficking, established the foundation for a system of reporting suspicious transactions. It provided the avenue for assisting law enforcement officials to conduct investigations into drug money laundering offences.

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[142] See note 140 above

[143] See note 29 under chapter 3.6

[144] Section 22(6) of the DTOA 1993 as amended on 27th June, 1996 provides as follows: *"A person guilty of an offence under this section and under section 21 is liable –*

(a) on summary conviction – to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years or to both;

(b) on conviction on indictment – to a fine without limit or to imprisonment for a term not exceeding fourteen years or to both."

[145] Section 21(4) of the DTOA 1993 provided that: *"In proceedings against a person for an offence under this section, it is defence to prove on the balance of probabilities that –*

(a) he did not know or believe that the arrangement related to any person's proceeds of drug trafficking;

(b) he did not know or believe that by the arrangement the retention or control by or on behalf of "A" of any property was facilitated or, as the case may be that by the arrangement any property was used as mentioned in subsection (1); or

(c) *he intended to disclose to the police officer such a suspicion or belief that there is reasonable excuse for his failure to make such a disclosure.*

[146] Assisted in this context also included acquiring, concealing or disguising property derived from drug trafficking or in some way connected thereto.

[147] Lilley P., "Dirty Dealing- The Untold about Global Money Laundering, International Crime and Terrorism." *Kogan Page* 2nd edn. 2003 p3 where *it was stated that; " ...it has been estimated that the illicit drugs industry is worth 400 billion per industry. It has 400 million regular customers. $200 billion is successfully laundered across the world each year. And that total is one part of the global money laundering process.*

The mere fact that Section 21(3) does not criminalise failure to report dubious transactions may not be fatal. There is no evidence to support the contention that people would be more inclined to report dubious transactions more quickly than they would in the absence of a legal obligation. For example, in England and Wales, although an offence of failing to disclose drugs money laundering was introduced in Section 52 of the Drug Trafficking Act 1994, only 15 convictions[148] were recorded each year up to 2000. During the three years prior to 1994 the total convictions were higher at 16[149] each year. It is difficult to conjure up the circumstances in which a person who is not involved in drug trafficking money laundering can be convicted for failing to report knowledge or suspicion of drug money laundering. It would appear that anyone (especially in the context of the Vincentian society) who failed to report suspicion or knowledge of drug money laundering is actually facilitating the process and, if he is in some way involved, he may be penalised under Sections 21(1) or 22(2) or (3) of the DTOA. Without more it is difficult to justify the effectiveness of an offence of failing to report knowledge or suspicion of drug money laundering.

The PCA 1997, as amended, had a more far reaching effect than the DTOA which was restricted to drug trafficking offences, since it governed *"the forfeiture or confiscation of the proceeds of certain crimes and for connected or related matters."*[150] Section 51 of the PCA 1997 established a bipartite reporting mechanism. It required financial institutions to report to a police officer or the Director of Public Prosecutions, information that it had reasonable grounds to believe warranted an investigation or facilitated the enforcement of the PCA itself.[151] The section was subsequently amended to include mandatory reporting of cash transactions in excess of ten thousand United States Dollars or its equivalent to the Offshore Finance Inspector, where the institution was an offshore company or to an anti-money laundering unit or an official designated by the Minister of Finance in all other cases. [152] Both reporting systems required

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148 Alldridge P., "Money Laundering," Hart, 2003 at p 205.
149 Ibid
150 The preamble of the PCA 1997 (now repealed)
151 Section 51(1) of the PCA 1997 (as amended) provided that: *"Where a financial institution has information about an account held with the institution and the institution has reasonable grounds for believing that-*
(a) *the information may be relevant to an investigation of, or the prosecution of, a person for an offence; or*
(b) *the information would otherwise be of assistance in the enforcement of this Act or any regulations made there under,*
the institution shall give the information to a police officer or the Director of Public Prosecutions."
152 Section 51(2) as amended provided that: *"Where a financial institution has information about any cash transaction with the institution that relates to single deposit, withdrawal or transfer of an amount of*

mandatory disclosure to the relevant authorities, although it was essential that in the former system the financial institution carried out an assessment of the information prior to making the disclosure.[153]

By limiting the legal obligations to disclose, merely to financial institutions, the PCA 1997 appeared not to have required the disclosure of information by other intermediaries, including lawyers, accountants and other financial advisors. Intermediaries also provide services that could have facilitated the money laundering process. They could have been privy to information that would have greatly assisted law enforcement officials to further investigate the reasons for dubious transactions. But note that in England and Wales professionals such as accountants and lawyers accounted for an average of 2.6%[154] of the suspicious activity reports from the period 1995-1998. This represented a very small portion of the approximately 14,000 suspicious activity reports that were received by the National Criminal Intelligence Service (NCIS) each year. However, the apparent absence of a legal obligation to report dubious transactions does not totally absolve intermediaries from criminal liability. Any failure to report can be otherwise interpreted as a violation of either Sections 59, 60 or 61 of the PCA 1997[155] which can result in a charge being made for a money laundering offence. The possibility of a conviction, along with its draconian penalties[156] could have created an incentive on the part of the intermediaries to make a disclosure of dubious transactions.

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money in foreign currency being in excess of ten thousand dollars United States currency or its equivalence in foreign currency, the institution shall report the information-

(a) *in the case of a cash transaction by a company registered with the St. Vincent and the Grenadines Offshore Finance Authority, to the Offshore Finance Inspector; and*

(b) *in the case of all other cash transactions to a special anti-money laundering unit or official designated by the Minister of Finance"*

[153] This assessment was required to be carried out by the financial institution in order to establish whether there were reasonable grounds for believing that the information may have been relevant to an investigation or the enforcement of the provisions of the PCA 1997.

[154] Alldridge P., "Money Laundering," 2003, at p 261.

[155] See notes 22, 23 and 24 above

[156] Section 59(2) of the PCA 1997 provided as follows: "*A person who, after the commencement of this Act, engages in money laundering commits an indictable offence and is liable on conviction, to -*

(a) *a fine not exceeding five hundred thousand dollars or imprisonment for a period not exceeding twenty years, or both such fine and imprisonment; or*

(b) *a fine not exceeding one million dollars in the case of a body corporate.*

Section 61(1) of the PCA 1997 provided: "*A person who engages in organised fraud commits an indictable offence and is liable on conviction, to -*

(a) *a fine not exceeding five hundred thousand dollars or imprisonment for a period not exceeding twenty five years, or to both such fine and imprisonment; or*

(b) *a fine of one million dollars if a body corporate.*

Moreover, it could be argued that the definition of financial institutions may well have created a *lacuna* through which offshore financial institutions could have escaped the legal obligation to report dubious transactions. It may also have been for that reason why the FATF concluded that offshore financial institutions were excluded from reporting suspicious transactions. It will however, be argued that the reporting mechanism under the PCA 1997 did include offshore financial institutions. Section 46 of the PCA 1997, defined a financial institution as follows:

> *"For the purposes of section 47 to 52, 'financial institution' means –*
> *(a) a bank licensed under the Banking Act (Cap. 63);*
> *(b) a building society registered under the Building Societies Act (Cap. 324);*
> *(c) a credit union registered under the Cooperative Societies Act (Cap 325);*
> *(d) a trust company, finance company or deposit taking company, recognised by the Minister responsible for Finance as such."*

Pursuant to Section 46(d) the Minister of Finance was given the discretion to determine whether a particular institution in one of the stated categories should be treated as a financial institution for the purposes of the PCA 1997. This discretion may be restricted to institutions that could be considered to be trust companies, deposit taking companies or finance companies.[157] Therefore, unless intermediaries, fell within one of those categories it is arguable that they may not have been required by law to disclose information even if they formed the belief or their suspicions were aroused that a transaction involved the proceeds of criminal conduct. It is nonetheless important to note that the section did not make any distinction between offshore and onshore financial institutions. Therefore, it can be construed[158] to include registered agents, mutual funds, international insurance and international banks into the categories of trust company insofar as a Registered Agent is concerned and deposit taking company or

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[157] Quazi v Quazi [1980] AC 744 ; See Harris J., "Legal Philosophies" Butterworths, 2nd edn. 1997 at p 160 where Harris Stated that: *"The maxim expression unius est exclusion alterius permits one to infer that, where one of a natural collectivity of items is expressly mentioned, the legislature must have intended not to have included the rest. The courts may look at the rest of the law, and take judicial notice of any facts of common knowledge when the statute was enacted. To resolve an "ambiguity," they may look at the statutes long title, the preamble (if any), and its cross headings and side notes."*

[158] River Wright Comr v Adamson (1877) 2 App Cas 743 at 764-765 *"I believe that it is not disputed what Lord Wensley used to call the golden rule is right, viz. that we are to take the whole statute together, and construe it altogether, giving the words their ordinary signification, unless when so apply they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could have been to use them in their ordinary signification, and justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear.": See also* A-G v Lockwood *(1842) 9 M &W 378 at 398 where it was stated that: "The rule of law, I take it, upon the construction of all statutes...is whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."*

finance company with regard to mutual funds, international banks and international insurance.

A Registered Agent is a person licensed[159] by the OFA pursuant to Section 5(3) of the Registered Agent and Trustee Licensing (RATL) Act 1996[160] to conduct the business of offshore representation.[161] This included amongst other services, acting as trustees and or financial fiduciaries[162] for international trusts. Pursuant to Sections 5(1)[163] and (2)[164] of the RATL Act 1996 a registered agent and trustee licence may only be issued to a natural or a juridical person, provided that the application is proper and that the former is a citizen of SVG and the latter is ultimately, beneficially owned or controlled by a citizen of SVG. Essentially, a corporation that was licensed by the OFA to conduct the business of offshore representation could have been classified as a trust company.[165] But individuals are also eligible to be licensees as well. Will they therefore fall within the category of trust company? To proffer the argument that a natural person who conducted such business could also have been classified as a trust company is tenuous,

[159] Section 2 of the RATL Act 1996 as amended defined a licensee as; "..*a person holding a current and valid license to undertake the business of offshore representation.*"

[160] Section 5(3) of the RATL Act 1996 as amended provided as follows: "*If the Authority, on the advice from the Offshore Finance Inspector, is satisfied that an applicant for a license meets the requirements of this Act and the applicant is qualified to carry on the business of Offshore Representation, it may grant the application and issue to the applicant a license subject such terms and conditions as it shall direct, if any.*"

[161] Section 2 of the RATL Act 1996 as amended defined Offshore Representation to: "... *include one of more of the following acts or activities:*

(a) *acting as agent or representative in the establishment, registration, renewal or continuation of company under the International Companies Act or the international Business Companies Act 1996 or the registration of a trust pursuant to the St. Vincent Trust Authority Act or the International Trusts Act 1996;*

(b) *providing registered office or registered agent services in the state for companies incorporated, licensed or continued under the International Companies Act;*

(c) *providing or appointing nominee directors, nominee shareholders or nominee officers for companies incorporated under the International Companies Act or the IBA, 1996; or*

(d) *acting as a local trustee or fiduciary for a trust that has or seeks exemption from taxation under the Saint Vincent Trust Authority Act or the International Trusts Act, 1996 whether or not such trust is registered or to be registered under either act.*"

[162] Section 2 of the RATL 1996 as amended defined financial fiduciaries to include: "...*a licensee who engages or intends to engage in activities as a trustee, nominee, intermediary, or manager with respect to the money, securities or financial assets or instruments of a client or customer in the course of such licensee's business of Offshore Representation.*"

[163] Section 5(1) of the RATL Act 1996 as amended provides that: "*Subject to the discretion of the Authority, a license may be issued to a natural person who is a citizen of the State or to a company that is incorporated and in good standing under the Companies Act, who or which makes proper application therefore to the Authority, and who or which provides the information and the materials specified in the schedule to this Act.*"

[164] Section 5(2) of the RATL Act 1996 as amended provides that: "*No company shall be issued a license under this Act unless that company is ultimately, beneficially owned or controlled by a citizen of the State.*"

[165] Martin J., "Hanbury and Martin Modern Equity" Sweet & Maxwell, 16th edn. 2001 at p 508

since a company is a juridical person distinct and separate from its owners.[166] However, for the purposes of construction, it may appear absurd that a juridical person and a natural person conducting the same business should be distinguished in this way. Of the 30 registered agents that were at the time of the blacklisting licensed by the OFA, less than 1% were natural persons who were mainly lawyers and about 90% were companies that were owned or managed by lawyers and accountants.[167] Therefore excluding, those intermediaries should not be construed as the state of affairs that parliament intended.

At the time when the PCA was passed[168] in the House of Parliament, three licensed offshore banks[169] were already operating in SVG and the OFSS was established 21 years previously. None of those three banks had a correspondent banking relationship[170] with any foreign banks and therefore, they opened accounts at domestic banks in which they deposited the funds that they received from their customers and transacted business that was related to their banking operations. They were therefore customers of the domestic banks just as any individual would be. The domestic banks, in accordance with Section 46(a) of the PCA 1997 were legally obliged to report any information that was relevant to an investigation, prosecution of a person or to facilitate the enforcement of the PCA itself.[171] In this way it could be argued that the activities of offshore banks were nonetheless subject to scrutiny even though Section 46 did not expressly require them to disclose.

Furthermore, being a deposit taking company, Section 46(d) empowered the Minister of Finance with the discretion to categorise offshore banks as financial institutions. Should the section be construed to mean that offshore financial institutions were automatically excluded until the Minister of Finance ruled otherwise? Such a construction can be sustainable in the absence of parliamentary pronouncements which clearly indicate to

[166] Salmon v A Salmon & Co Ltd. [1897] AC 22 at 51 as per Lord MacNaghten; *"The Company is at law a different person altogether from the subscribers to the Memorandum, and although it may be that after incorporation the business is precisely the same as it was before and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment."*
[167] Information obtained from records at the OFA.
[168] The PCA 1997 was passed in the House of Parliament on 28 August, 1997 and assented to on 19th November, 1997.
[169] Records from the St. Vincent and the Grenadines Offshore Finance Authority showed that the three banks were, New Bank Ltd, Nano and Sons Private Bankers Ltd and Security Bank and Trust Company Ltd.
[170] Information obtained from interview with offshore banks.
[171] Section 51(1) of the PCA 1997

the contrary. In **Pepper v Hart**[172] the House of Lords ruled effectively that the spirit and the letter of the law should be considered when construing statutes to find the intention of parliament. This would include reliance on statements made by ministers which led to the enactment of the Bill, "*where the legislation is ambiguous or obscure or the literal meaning leads to an absurdity.*"[173] It is beyond doubt that literally, section 46 can be interpreted to exclude offshore entities unless the Minister of Finance exercised his discretion to the contrary. But to so interpret section 46 will undoubtedly lead to an absurdity, since such an interpretation is likely to contradict with the intention of parliament and the reason for the introduction of the Bill in the first place.

The OFSS provided an avenue through which international investors were able to minimise the payment of taxes and maximise their returns in a commercial environment of privacy and confidentiality. The sums therein invested were usually substantial when compared to investments that were made in the domestic sector[174] and the probability of the funds invested representing the proceeds of illicit activities was much greater in the OFSS than the domestic financial sector. The purpose of the PCA was to combat crime by taking the profits out of crime. It did not matter whether the crime was committed by an offshore entity or investor or a local person (juridical or natural). It is widely accepted that transnational and organised crimes are so rampant that they are menaces to society. It has also been reported that offshore finance centres are potential, if not actual facilitators of money laundering. It would not seem plausible for the Act on the one hand to penalise the criminal conduct of offshore entities and individuals and on the other to exclude the means (reports from offshore financial institutions) by which it is likely to convict those involved in criminal conduct. In essence, this would have been inefficacious.

During the passage of the Proceeds of Crime Bill in the House of Parliament the Attorney General's opening remarks were as follows:

> *"Mr. Speaker, St. Vincent and the Grenadines is party to the Vienna Convention which sets out to deal with drugs. Over the years, this country in honour of its obligation under the Vienna Convention has passed into law a number of different pieces of legislation which I would just note, Mr. Speaker. This Parliament has passed the Mutual Legal Assistance in Criminal Matters Act, it also passed the Drug Trafficking Offences Act. St. Vincent and the Grenadines has also entered into an Extradition Treaty with the United States of America...Now the Proceeds of Crime Bill, Mr.*

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172 [1993] AC 593
173 Harris J., "Legal Philosophies" Butterworths, 2nd edn. 1997, p 166.
174 Information from the records of the OFA and compared with GDP of SVG.

Speaker is about the last bit of legislation which will complete our obligation under the Vienna Convention."[175]

All of those enactments to which the Attorney General referred were measures relating to international cooperation (see below) and the fight against transnational crime. This effort should not be overlooked because it established in an unequivocal manner parliament's[176] attitude to crime in general and transnational crime in particular. Therefore, parliament could not have intended to exclude offshore financial institutions, or its anti-money laundering mantra[177] would not have been euphonious and this would have vitiated the apparent intended synthesis between the offshore legislation and the money laundering initiative. Since **Pepper v Hart** the courts are more inclined towards the purposive approach to the interpretation of statutes. This will also include an assessment of the general context of the statute and the purpose it is intended to serve in its quest to find what Parliament intended. In seeking Parliament's intention the court has in the past interpreted the statute by inserting certain words that would remove any absurdity arising from its literal interpretation. To remove any absurdity of the definition of financial institution prescribed under Section 46 of the PCA 1997 the court may consider inserting[178] the words 'or any other financial institution' recognised as such by the Minister of Finance.

The amendment that was made to Section 51[179] of the PCA 1997 in 1999 further established the context within which the offshore sector was considered by parliament. It not only supported the argument that offshore financial institutions were to be treated as financial institutions pursuant to Section 46 of the PCA 1997 but also that there existed in SVG an effective mandatory reporting mechanism. That amendment (Section 51(2)) proceeded as follows; *'where a financial institution...'* and then went on in

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[175] St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997 p 32

[176] The Attorney General Hon Carl Joseph expressly indicated as follows: *"This Bill, therefore Mr. Speaker, seeks to impose upon institutions that deal with money, the obligation to answer questions about any sums of money that may have been deposited with them, to divulge such information either through examination of records or let it be done orally...to the authorities."* Note that the Attorney General referred to 'institutions that deal with money' but did not distinguish between onshore and offshore institutions

[177] St. Vincent and the Grenadines Parliamentary Debate 28th August, 1997 at pp. 33 and 51: St. Vincent and the Grenadines Parliamentary Debate 27th June, 1996, at pp. 22, 25, 26 and 45 where anti-money laundering sentiments were expressed by Members of Parliament promoting the Bill.

[178] Major and St. Mellons Rural District Council v Newport Corpn [1950] 2 All ER 1226 at 1236 as per Denning LJ, in reference to the interpretation of statutes *"We sit here to find out the intention of Parliament and of the Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."*

[179] See note 151 above

subsection (i) to provide for the mandatory reporting of cash transactions in excess of $US10,000.00. The mention of financial institutions in the amended Section 51(2) of the PCA 1997 brought offshore finance entities within the definition of financial institutions prescribed in Section 46 of the PCA 1997. Therefore, the argument that the OFSS was excluded from the STR system could not be easily sustained.

The criteria placed emphasis on the word *"suspicious"*[180] whereas Section 51(1) of the PCA 1997 made reference to *"reasonable grounds for believing."* The term "suspicious" as the mens rea for certain crimes has firmly taken root as a novel development in the English Criminal Law.[181] It gained universal acceptance during the 1990's when the FATF's initiative on money laundering begun to take effect and most recently, after the terrorists destruction of the twin towers in the USA on 11th September, 2001.[182] The question that befuddled exponents of the global money laundering initiative was just what was suspicion?[183] In a Privy Council case it was held that suspicion should be given its ordinary meaning and that it represented *'a state of conjecture or surmise in the absence of proof.'*[184] The word suspect was defined in the Oxford English Reference Dictionary to include, *"doubt the genuineness or truth of."*[185] Wherever such a doubt existed, it should be based on a substratum of fact, even where it appears insignificant, and just not on mere speculation.[186]

Following the Privy Council decision there was still uncertainty and lack of clarity as to the precise definition of suspicion. Accordingly Barry Rider suggested that suspicion is *"an alternative ingredient of the mens rea."*[187] That suggestion was made in order *'to cover the situation where a person deliberately chooses not to carry out an investigation into the source of the funds. Obviously, it must be proved that he was suspicious in the first place as to the status of the person with whom he is dealing...'*[188] But that approach seems to confuse knowledge[189] with suspicion. Essentially, it expresses the 'doctrine of wilful blindness'

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[180] Note also that Section 21(3) of the DTOA 1993 required reporting if a suspicion was formed that a transaction was dubious.
[181] Howard C., "Butterworth Money Laundering Law," 2001 p 3/77 para 195
[182] Freeland C, "How Can Sound Customer Due Diligence Rules Help the Misuse of Financial Institutions in the Financing of Terrorism?" at pp 41-48, a chapter in Mark Peith's – "Financing Terrorism" 2002 Kluwer Academic Publishers.
[183] Wadsley J., "Money Laundering; Professionals as Policeman;" The Conveyancer (1994) at p. 284.
[184] Hussein v Chong Fook Kam [1969] ALL ER 1626
[185] p 1453
[186] Walsh v Loughman [1991] 2 VR 351
[187] Howard C., : "Butterworth Money Laundering Law," 2001 p 3/77
[188] Rider B., "Fei Chien Laundries: the pursuit of Flying Money (Part II)" (1992) 1 (3) J Int P 144
[189] Westminster City Council v Croyalrange [1986] 2 All ER 353

which Simester and Sullivan indicated *"...applies where the defendant intentionally chooses not to enquire whether something is true because he has no real doubt what the answer is going to be. Its effect is to attribute knowledge of the circumstances to the defendant. In other words where the wilful blindness doctrine applies, the law will treat the defendant as having actual knowledge..."*[190]

Turning to *"reasonable grounds to believe,"* pursuant to section 51(1) of the PCA 1997, the term reasonable introduced an objective standard into the reporting mechanism. The mens rea of a reasonable person is substituted for that of the person responsible for disclosing the information.[191] If in the light of the surrounding circumstances a reasonable person would have believed that a transaction was dubious and therefore should be reported, then that state of mind would be attributed to the person whose responsibility it was to make the disclosure. Belief on the other hand is something short of knowledge,[192] whereas suspicion may be considered to be a state of conjecture. The term "believe" connotes the existence of fewer doubts than would be expected where there is a suspicion and would require further analysis of the transaction before making a disclosure.[193] But as Howard enquired, how detailed would the information have to be before an individual could satisfy himself that he should (or in fact must) disclose a belief?[194] It is arguable that since belief requires fewer doubts than suspicion,[195] introducing "reasonable grounds to believe" would restrict the number of dubious transactions which would otherwise have been reported where the duty to report was based on suspicion.[196] But in reality is that argument sustainable, especially where there is a lack of clarity with the meanings of knowledge, belief and suspicion?[197]

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[190] Simester A., & Sullivan G., "Criminal Law, theory and doctrine" Hart Publishing 2000, pp 138-139

[191] Cordas v Peerless Transportation Co 27 NYS 2d 198- where the objective test was expressed as failure to demonstrate *"care and caution which a reasonable and prudent person ordinarily would exercise under like circumstances."*

[192] Hall (1985) 81 Cr App R 260, at 260 where the court held: *"A man may be said to know that goods are stolen when he is told by someone, with first hand knowledge (someone such as the thief or the burglar) that such is the case. Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: 'I cannot say I know for certain that these goods are stolen but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen.' "*

[193] Howard C., "Butterworths Money Laundering Law," 2001 at p 3/85, paras 200-210

[194] Ibid at p 3/585, para 813

[195] Ibid at p 3/585, paras 815-820

[196] Alldridge P., "Money Laundering," 2003, at pp 182-183

[197] Simester A., & Sullivan G., "Criminal Law, theory and doctrine" 2000, at p. 487 where in response to the distinction between belief and knowledge in the offence of handling; *"But those distinctions are without great value. It is generally impossible to know anything with utter certainty; even the evidence of one's own eyes may occasionally be doubted ..."*

It is interesting to note that the use of the phrase 'reasonable grounds to believe' instead of reasonable grounds to suspect or even suspicion in Section 51(1) of the PCA 1997 is a classic situation of the application of particular jurisprudence.[198] Jeremy Bentham observed that laws should be drafted to fit local conditions when he stated that:

> *"Thus in the case of Penal Law. Of the genera of Offences, as distinguished or distinguishable by their generic names –Murder, Defamation, Theft, Robbery and so forth –definitions for the most part are the same all the world over. But for particular species, occasion may be afforded by particular local circumstances…"*[199]

Twining also stated that:

> *"It is one thing to claim that a thick description of any society or culture or social practice must depend on local knowledge and hence be particular; it is another to claim that a society or culture or practice can only be described, interpreted or explained solely in its own terms. Most writing by historians and social anthropologists is particular and local, because they tend to study events and phenomena that are unique in important respects; but those writings are based on theories, methods and concepts that have some claim to generality – and some may be unknown locally. Conversely, it is a truism, accepted by both Hart and Dworkin, that to give an adequate account of a particular social practice or legal system typically involves taking into account the internal point of view of participants in that practice or system, including their concepts and language."*[200]

Essentially, suspicion to the ordinary person is a *"gut"* feeling about something or someone. The feeling may be good or bad, right or wrong, justified or unjustified. It could have been informed by knowledge of the surrounding circumstances (e.g. the person, the level of transaction, nature of business operations etc.)[201] or by sheer prejudice. Whatever the reason for the suspicion, it is reasonable to assume that the employees at financial institutions may not have been exposed to the minutiae of the 'lego-technical' and philosophical nuances of the term suspicious. In a country where the people were avid for scandal, their definition of suspicious was likely to be based on their culture, knowledge of the surrounding circumstances, their prejudices and their beliefs and law enforcement officers being products of the society are empowered to arrest any person whom they have reasonable grounds to suspect has committed an offence.[202] During a parliamentary debate on the Drug Trafficking Offences Bill 1993,

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[198] Twining W., "Globalisation & Legal Theory" Butterworths 2000, at pp 12- 13 "Particular Jurisprudence focuses on the general aspects of a single legal system or order and is constituent phenomena."

[199] Bentham J., –*"Letter to James Madison, 30th October, 1811,"* 8 Correspondence 182-215 (ed S. Conway 1988) included in Twining W., "Globalisation & Legal Theory" 2000, at p. 19

[200] Twining W., "Globalisation & Legal Theory" Butterworths 2000, p 43

[201] Howard C, "Butterworths Money Laundering Law," 2001, at p 3/586 para 821

[202] Pursuant to Section 30(1)(a) of the Criminal Procedure Code of the 1990 Revised Laws of St. Vincent and the Grenadines: *"Any police officer may, without an order from a magistrate and without a warrant, arrest –*
(a) any person whom he suspects upon reasonable grounds of having committed an indictable offence;"

in referring to the characteristics and traits of the people of SVG, a government Minister, the Honourable Carlyle Dougan retorted that:

> *"I haven't even completed building my house. It is a fairly big house and malicious people in this country are even telling me that they say 'that boy there, that fellow there, that guy Dougan there is trafficking in drugs...' you wouldn't even believe...the so called middle class in this country would go as far as to think that."*[203]

Therefore, when deciding to make a disclosure of a financial transaction, for the most part it would be highly likely that belief and suspicion would conflate, thus confusing any distinction between suspicion, knowledge and belief. Where such a situation existed, for the purposes of disclosure, suspicion and belief would bear little or no distinction for those charged with the responsibility for determining whether or not to report a particular transaction. Interestingly, there have been some concerns expressed about the ease with which a suspicion can be proved and the difficulties in refuting it.[204] Even the suggestion to replace knowledge with the belief, as the mens rea for a money laundering offence in order to procure more easily money laundering convictions, was considered to be difficult to justify.[205]

In addition to the suspicious transaction reporting system pursuant to Section 21(3) of the DTOA 1993 and the reporting mechanism provided by Section 51 of the PCA 1997, as amended, SVG also made legislative provisions for the monitoring of accounts that were thought to have been the repositories for the proceeds of crime.[206] Under the PCA 1997 ex parte applications[207] could have been made to the Court by a police officer for monitoring orders to monitor the activities of accounts where there were reasonable grounds to suspect that those accounts were used to transact the proceeds of crime. The effect of the order required a financial institution to disclose the activities of an account to the police.[208] This was indeed a powerful weapon in the armoury of law enforcement officials, since the holder of the account to which the application related and for which the order was granted, was unaware of the order and those with knowledge of the order

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203 St. Vincent and the Grenadines Parliamentary Debate 16th December, 1993 pp 32-33

204 Howard C, "Butterworths Money Laundering Law," 2001, at p 3/585 para 814

205 McCormack G., "Money Laundering and Banking Secrecy," The Company Lawyer, Vol 16 No. 1, 1995, at p. 8

206 Section 47 (1) of the PCA 1997 provided that: *"A police office of or above the rank of Assistant Superintendent may apply to a Judge in Chambers in accordance with subsection (2) for an order (in this section called a "monitoring order") directing a financial institution to give information to a police officer."*

207 Section 47 (2) of the PCA 1997 provided that: *"An application under subsection (10 shall be made ex parte and shall be in writing and be accompanied by an affidavit."*

208 Section 47 (3) of the PCA 1997 provided that: *"A monitoring order shall direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the institution."*

were prohibited from disclosing the information, unless certain conditions existed.[209] However, before an order could have been issued the Judge had to be convinced and satisfied that there were reasonable grounds for suspecting that the account holder was engaged in or facilitating criminal conduct.[210]

A monitoring order with its emphasis on reasonable grounds to suspect simplified the investigative process under Section 47. The application could have been initiated as a result of a suspicion or knowledge or belief that was formed and reported either by law enforcement of SVG or another country or from civilians of SVG or another country. A monitoring order was not too difficult to obtain since all that was required was for the judge to be satisfied[211] that the information particularised in the affidavit would have aroused a suspicion that the account holder was about to or in some way involve in criminal conduct.[212] Reasonable grounds meant that from the information provided a reasonable person would have become suspicious of the activities of the holder of the account for which the application was made for a monitoring order. Moreover, the Criminal Procedure Code also provided that:

> *"Any police officer may, without an order from a magistrate and without a warrant, arrest;*
>
> *(a) any person whom he suspects upon reasonable grounds of having committed an indictable offence..."*[213]

In the light of the fact that a money laundering offence was an indictable offence, together with Section 30(1(a) of the Criminal Procedure Code, the monitoring order was a very powerful tool for law enforcement officials in the fight against money laundering.

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[209] Section 48(1) of the PCA 1997 provided that: *"A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or the operation of the order to any person except –*
- *(a) an officer or agent of the institution, for the purpose of ensuring that the order is complied with; or*
- *(b) an attorney-at-law, for the purpose of obtaining legal advice or representation in relation to the order; or*
- (c) *the Commissioner or police office authorised in writing by the Commissioner to receive the information."*

[210] Section 47(5) of the PCA provided that: *"A Judge shall not make a monitoring order unless he is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the information is sought –*
- *(a) has committed, or is about to commit a scheduled offence;*
- *(b) was involved in the commission ,, or is about to be involved in the commission of a scheduled offence; or*
- (c) *has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a scheduled offence."*

[211] Section 47(5) of the PCA 1997 (now repealed)

[212] Section 47(2) of the PCA 1997 (now repealed)

[213] Section 30(1)(a) of the Criminal Procedure Code Chapter 125 of the 1990 Revised Laws of St. Vincent and the Grenadines.

Further encouragement to report dubious activities by offshore customers was provided under Section 3(3) (b) (iv) of the CRPA 1996. That section authorised an offshore bank to disclose confidential information to anyone if the interest of the bank was threatened. Such an interest may also have been threatened if the bank failed to disclose.

Although failing to report dubious activities does not in itself attract any criminal liabilities apart from that which was provided under section 22(6) of the DTOA 1993 and which relates to Section 21(3) of the said Act, there is no evidence that it has reduced the number of transaction reports. The only recorded evidence of suspicious reports pertained to drug related activities. This showed that over the past 10 years the highest number of reported drug related crimes was 528 and that was in 1997. Since then there was a steady decline every year to 459 in 2002.[214] On the basis of the foregoing the legislative framework may not have created the best regime there is for the reporting of suspicious transactions but it was nonetheless adequate.

4.8 Criterion 12[215]

This criterion assessed whether SVG had implemented measures that enabled authorities to determine the principals of commercial entities. In that regard the FATF concluded that; *"The registration requirements for quite all types of legal entities in St. Vincent and the Grenadines are completely inadequate, allows bearer shares or nominee or do not require any kind of identification of the beneficial owners."*[216] This statement evidently highlighted the unsubstantiated and scathing generalizations of the FATF's conclusions. The FATF in the introductory section of its report provided a list[217] of the legislation that it reviewed during its assessment of SVG. That list did not contain legislation relating to the registration of domestic entities such as banks, cooperative societies, building societies and insurance companies. Therefore the FATF could not have effectively assessed the regulatory and supervisory framework of those entities. Accordingly, on what grounds can the FATF substantiate the conclusion that *"all types*

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[214] Royal St. Vincent and the Grenadines Police Force Crime Statistics

[215] **Criterion 12: "Inadequate means of identifying, recording and making available relevant information related to legal and business entities (name, legal form, address, identity of directors, provisions regulating the power to bind the entity)."**

[216] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 4.

[217] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 1.

of legal entities in St. Vincent and the Grenadines are completely inadequate, allows bearer shares or nominee directors or do not require any kind of identification of the beneficial owners?" The fallacy of the FATF's conclusion has already been emphasised above under the sections that discussed criteria 1, 2, 3, 4, 5 and 6 and needs no further elaboration in that regard.

Moreover, the FATF concluded that; *"This is especially the case for International Business Companies (see sections 3, 9 and 12 of the IBC Act) and for International Trusts (see sections 52 to59 of the International Trusts Act), which are designed for international business and for which no kind of registration of name of settlor nor of beneficiary is required."* Insofar as IBCs are concerned, Section 3[218] only permitted persons who were *sui juris* to be involved in the formation of a company. Section 9 permitted the issuance of bearer shares and Section 12[219] prescribed the procedure that the Registrar of companies should follow on the receipt of an application for the registration of an IBC. The FATF did not however review the International Business Companies Regulations (IBCR) 1996

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[218] Section 3(1) of the IBC Act 1996 provided: *"Subject to the requirements of this Act, one or more persons may incorporate an international business company by signing and sending Articles to the Registrar in accordance with the provisions of this Act, so long as such articles have been subscribed by a registered agent."*

Subsection (2) provided: *"No individual who*

(a) is less than 18 years of age;
(b) is of unsound mind and has been so found by a tribunal in the State or elsewhere; or
(c) has the status of a bankrupt

shall form or join in the formation of an international business company."

[219] Section 12 (1)of the IBC Act 1996 provided that : *"The Registrar shall not register the Articles delivered to him unless he is satisfied that all requirements of this Act in respect of registration have been complied with and*

(a) a solicitor acting in formation of the company or
(b) the registered agent named in the Articles as registered agent,

certifies in writing that the requirements of this Act in respect of registration have been complied with, and the written certification delivered to the Registrar is sufficient evidence of compliance; provided, however, if a solicitor acts in the formation of the company, such company must still appoint and maintain a registered agent as provided in this Act."

Subsection(2): *"Subject to subsection (1), the Registrar shall retain and register the Articles submitted to him in a Register to be maintained by him to be known as the Register of International Business Companies."*

Subsection (3): *"Upon the registration of the Articles, the Registrar shall issue a certificate of incorporation under his hand and seal certifying that the company is incorporated as an international business company."*

Subsection (4); *"The Minister, on advice of the Authority, may direct that the Registrar maintain one or more Branch Registers either within or outside of the State; provided that any such register shall be maintained under the supervision of the Registrar and the Offshore Finance Inspector and shall be managed by a citizen of the State; provided further, if a Branch Register is maintained outside of the State, all information received or residing at such Branch Register shall be made secure against disclosure or intervention by any person or government authority under procedures acceptable to the Authority."*

which set out further procedures for the registration of IBCs. Regulation 4 provided that; *"Pursuant to Section 11 of the Act an applicant to register an international business company shall submit to the Registrar in duplicate a completed version of Form 3..."* Form 3 required in addition to other pertinent matters (e.g. name and address of company), the submission of the names and signatures of the initial members of the company. Those members were legally required to appoint the directors of the company.[220]

The implications of bearer shares were valid concerns of the FATF. Those concerns have already been discussed under criterion 2 above and do not require further elaboration. Equally, the ability to conceal the names of directors because there was no legal duty to disclose that information to the Registrar may have also created some concern. But it was rather uncanny that there were other jurisdictions[221] with similar (in some cases identical) legislative registration requirements for IBCs as those enacted in SVG yet they were never blacklisted or were removed from the blacklist before SVG. Moreover, at the time of the release of the blacklist on which SVG was included, those jurisdictions (e.g. including BVI, Belize, Cayman Islands) permitted bearer shares and still permit the issuance of bearer shares.

With regard to international trusts, it had already been argued above (see criterion 5) that contrary to the conclusion of the FATF, the names of both the settlor and beneficiary were required to be submitted to the Registrar of Trusts when an application was made for the registration of a trust. Where, however, the settlor or beneficiary or both were corporations (as discussed above under criterion 5) it was conceded that remedial measures needed to be implemented to ensure that the identities of the beneficial owners of corporate settlors and beneficiaries were disclosed to the OFA. It is nonetheless noteworthy that whereas OFCs were being named and shamed for allegedly lacking adequate mechanisms for identifying beneficial owners of entities, the record of FATF countries in that regard had been worse, yet they had not been named and shamed. As Levi and Gilmore observed;

> *"A sense of grievance is especially likely when FATF member countries are not sanctioned for the same practices that would lead less powerful nations to be blacklisted. This may be politically tempting but it looks like the sort of (often unconscious) preference for symbolic victories over real impact that has bedevilled the*

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[220] Section 30(1) of the IBC Act 1996 provided: *"The first directors of an international business company shall be selected by the persons who have formed the company and thereafter, the directors shall be elected on an annual basis by shareholders for such term(s) as the shareholders or directors may determine."*

[221] Some of these jurisdictions include the British Virgin Islands, Cayman Islands, the Cook Islands etc.

> *'war on drugs' since its inception; if the UK, US and other powers are allowed not to identify beneficial owners, but the OGBS and smaller economies are required to identify them on pain of economic sanctions, how can a claim to effectiveness-whether as a motivation or as an effect- be justified?"*[222]

4.9 Criterion 13[223]

Whereas it is correct to state that the bearer share concept can create obstacles to identification for financial institutions, the FATF was not justified in describing the registration procedures of offshore entities as rudimentary (see argument under criterion 5 above).

Although bearer shares were (and still are) expressly permitted pursuant to Section 9 of the IBC Act 1996 (see above), there was no expressed permission or prohibition of nominees in the IBC Act 1996, although under the RATL 1996, Registered Agents were permitted to and are still permitted to hold such positions.[224] Any financial institution wishing to do business with an IBC could have requested of that IBC any information that it needed to establish a business relationship with the IBC.[225] There was (and still is) no legal requirement prohibiting a financial institution from obtaining the identities

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[222] Levi M., & Gilmore W, "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" at p. 110, a chapter in Peith M., "Financing Terrorism" 2002 at p. 110

[223] **Criterion 13: Obstacles to identification by financial institutions of the beneficial owner(s) and directors/officers of a company or beneficiaries of legal or business entities.**

[224] Section 2 of the RATL Act 1996 provides that:; *"Offshore Representation means and includes one or more of the following acts or activities:*

> *(c) providing or appointing nominee directors, nominee shareholders or nominee officers for companies incorporated under the International Companies Act or the IBA 1996... "*

[225] Section 105 (1)of the IBC Act 1996 provides that; *"The Registrar shall, upon request by any person, issue a certificate of good standing under his hand and seal certifying that a company incorporated under this Act is of good standing if the Registrar is satisfied that –*

> *(a) the name of the company is on the Register; and*
> *(b) the company has paid all fees, licence fees and penalties due and payable.*

(2) the certificate of good standing issued under the subsection (1) must contain a statement as to whether –

> *(a) the company is in the process of being wound up and dissolved; or*
> *(b) any proceedings to strike the name of the company off the Register have been instituted."*

Section 106 (1) of the IBC Act 1996 provides that; *"Except as provided in subsection (2) of section 71 a person may –*

> *(a) upon showing a proper purpose, inspect the Register kept by the Registrar pursuant to this Act;*
> *(b) require a certificate of incorporation, merger, consolidation, arrangement, continuation, dissolution or good standing of a company incorporated under this Act, or a copy or an extract of any such document of which he has custody, to be certified by the Registrar; and*
> *(c) require a certificate duly certified by the Registrar showing such then-current information available to it concerning a company incorporated under this Act as the Registrar and the Authority may think fit to provide.*

(2) A document or a copy or an extract of any document or any part of a document certified by the Registrar under subsection (1) is admissible in evidence in any proceedings as if it were the original document."

of the beneficial owners, directors/officers of a company. If the IBC refused to submit the particulars requested by the financial institution, that institution had the option of doing or not doing business with the IBC. Moreover, if the financial institution suspected, knew or had reasonable grounds to believe that the suppression of information by the IBC was a means of concealing criminal conduct, then it had a legal duty to report that IBC to the relevant authorities pursuant to Section 21(3) of the DTOA 1993 and Section 51 of the PCA 1997 as amended.

The nature of offshore business was such that IBCs required local representation in the form of local (persons residing in SVG) or alternate[226] directors to be able to function effectively and with alacrity. It was important to bear in mind that the OFSS was designed to encourage non-resident investors by according to them tax exemption benefits and privacy in return for their investments in the OFSS. Those non-residents for the most part were usually resident thousands of miles away(e.g. the US and Europe) from SVG. Contacting them frequently to carry out the functions of the IBCs was not only time consuming and costly, it was also an inconvenient and inefficient way to conduct business, especially when the office was located in SVG. Accordingly, someone or persons needed to be located at the office to manage the day to day affairs of the IBCs. In those circumstances local directors were appointed. The IBC Act 1996 did not expressly permit nominee directors and neither did it expressly impose a prohibition. However, in order to open a bank account, the IBC was required to submit the names, addresses and signatures of the directors to the bank at which the application was made.

Once again the hypocrisy of the FATF is being demonstrated against SVG without regard to the efforts that it has been making. The review process if it is to gain cooperation and efficacy must be fair and just for all countries concerned irrespective of their economic or military power. But unfortunately, it would appear that fairness and justice depended on the size of a country's economy and not its compliance with the 40 Recommendations or the 25 assessment criteria. Accordingly, "*...questions have been raised about the willingness of FATF to apply consistent principles to more powerful nations than Turkey and Austria; the prime candidate here is the USA, whose 1997 and subsequent*

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[226] Section 39(1) of the IBC Act 1996 provides that: "*Subject to the Articles or Bylaws a director may by a written instrument appoint an alternate who need not be a director.*
Subsection (2) provides that:" An alternate for a director appointed under subsection (1) is entitled to attend meetings in the absence of the director who appointed him and to vote or consent in the place of the director."

evaluations might appear to merit more severe treatment than it has received."[227] Moreover, during the time that the USA issued the Financial Advisory against SVG, some of its own states, including Montano, Colorado and Delaware, had in place banking privacy legislation which was advertised (e.g. Colorado) as a virtue of doing business in the state.[228]

Prior to June 2000 the FATF not only imposed upon NCCTs a more stringent anti-money laundering regime than what was internationally required, its double standards were also reflected in the extent to which the FATF required greater due diligence from NCCTs than from its own member States. As Professor Gilmore has pointed out:

> "*...while the criteria [meaning the 25 assessment criteria] are no doubt (and as claimed by FATF) consistent with the FATF 40 Recommendations, in a number of obvious respects they go beyond the standards set in them. This is well illustrated by criteria 13 and 14 relating to lack of identification of the beneficial owners of legal and business entities. While there is a growing appreciation of the practical importance on this matter, and a widespread acknowledgement of the need to develop and enforce appropriate standards, the NCCT criteria in question project well beyond the scope of Recommendations 9, 11 and 25 and the relevant interpretative notes as presently worded.*"[229]

Similarly, whilst NCCTs were being assessed against the 25 assessment criteria, FATF member countries were only required to ascertain the extent to which they were in compliance with the 40 Recommendations by conducting self assessment exercises of their anti-money laundering regimes.[230] Moreover, despite the findings of deficiencies in the anti-money laundering regimes of Argentina, Brazil and Mexico the FATF nonetheless admitted them as members.[231] In this regard Professor Gilmore observed that:

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[227] The Economist, 23 June 2001, at p 801 repeated in Levi M & Gilmore W, "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" in Peith M., "Financing Terrorism" 2002 at p. 101.

[228] Hay R., "Information Exchange and Offshore Finance Centres - Part 1" Private Client Business, 2002, 2, 88-97 at p. 96

[229] Gilmore W., "Changes to the Global Regime," a chapter in Clark A., & Burrell P., "A Practitioner's Guide to International Money Laundering Law and Regulation," City & Financial Publishing, 2003 at p. 286.

[230] Ibid – "*While non-members have been assessed against the NCCT criteria, FATF agreed in September 2001 merely to carry out a self-assessment exercise among its own members in order to determine their level of compliance. The results of that exercise will (at best) be formulated during the 2002-2003 round of FATF activities.*"

[231] www1.oecd.org/fatf/MLaundering_en.htm

"It should be noted that the criteria used to judge states and territories caught up within the NCCT process were far more exacting than those used in the admission to full membership of the Task Force of Argentina, Brazil and Mexico in June 2000... The substantive hurdle for membership was, however, set at a relatively low level, being tied to the satisfaction of a limited range of 'fundamental principles.' These included, in addition to the requisite political commitment to implement the Recommendations within a reasonable time frame, that the jurisdiction had already criminalised money laundering (beyond drug trafficking) and had made it mandatory for financial institutions to identify their customers and to report suspicious transactions. The Latin American assessments appear to have been conducted with sensitivity and flexibility, both of which qualities were seemingly needed in arriving at a positive outcome. These attributes are not, however, normally associated with the early stages of the NCCT process."[232]

4.10 Criteria 15[233] and 16[234]

Criterion 15 emphasises the need for international exchange of information. The money laundering problem is ubiquitous. It is widely accepted that no one country can effectively combat the proliferation of money laundering activities, due in part to technological improvements, the freedom of movement of capital and the ease with which money can be transferred universally.[235] Countries are therefore required to cooperate with each other by exchanging information that will be pertinent to the prosecution and conviction of those involved in criminal conduct. Whereas, it is accepted globally that the exchange of information is vital in the fight against money laundering, there are some differences as to the circumstances under which information should be given and the stage of the investigative process at which information should be disclosed. These differences vary among countries according to their experiences of the money laundering phenomena and their legal framework. Notwithstanding, the foregoing, the significance of communication amongst law enforcement officials within and without geographical boundaries cannot be overstated.

The FATF concluded that within SVG there were barriers to the international exchange of information. Accordingly, those barriers prohibited international cooperation by

[232] Gilmore W., "Changes to the Global Regime," a chapter in Clark A., & Burrell P., "A Practitioner's Guide to International Money Laundering Law and Regulation," 2003 at pp. 286-287.

[233] **Criterion 15: Laws or regulations prohibiting international exchange of information between administrative anti-money laundering authorities or not granting clear gateways or subjecting exchange of information to unduly restrictive conditions.**

[234] **Criterion 16: "Prohibiting relevant administrative authorities to conduct investigations or enquiries on behalf of, or for account of their foreign counterparts."**

[235] Hinterseer K., "Criminal Finance, The Political Economy of Money Laundering in a Comparative Legal Context," Kluwer Law International, 2002 at p 387 where he observed that: *"Today, money is able to move through different markets, economies, and jurisdictions at speeds limited only by the ability of information to be communicated from one place to another."*

administrative authorities. It referred to Sections 13 and 22 of the IBA 1996 as amended and Section 3(3)(b)(iii) of the CRPA 1996, as amended, as the three main provisions that prohibited the international exchange of information. The implications of section 13 have already been discussed under criteria 4 and 5 above and no further elaboration will provide assistance on this matter. However, an examination of the other two provisions will be conducted in order to ascertain the extent to which they prohibited the international exchange of information. Section 22 of the IBA 1996 provided as follows:

> Subsection (1): *"Subject to subsection (2), neither the Minister nor the Authority nor any person or entity acting under the authority of either, including the Offshore Finance Inspector, shall disclose or in any way remove from or transmit out of the State, any information relating to*
>
> *(a) any application made to him for license under this Act;*
> *(b) the affairs of a licensee; no matter how such information is gained; or*
> *(c) the identity or affairs of a customer of a licensee,*
>
> *which the Authority or any person or entity acting under the authority of the Authority has acquired in the course of his or its duties or the exercise of his or its functions under this Act."*
>
> Subsection (2): *"Subsection (1) does not limit the restrictions on disclosure set forth in the Confidential Relationships Preservations (International Finance) Act 1996.*

Section 22 essentially imposed a severe restriction not only on the international exchange of information with other law enforcement authorities but also on the regulatory body, (the OFA) itself. In order to provide assistance to other law enforcement authorities and to ensure that only reputable and desirable persons were permitted to participate in the opportunities that were available under the offshore banking operations, the OFA needed to acquire further information about the principals of the applicant. The acquisition of such information required further enquiries to; (a) check the veracity of the information contained in the references that were submitted by the principals of the applicant; and (b) conduct further due diligence in order to determine the bona fides of the principals and ascertain whether they had criminal records. Not surprisingly, the OFA, did not observe the restrictions imposed by Section 22(1) and conducted due diligence enquiries on the applicants for offshore banking licenses (and for applications for insurance and mutual funds licences) in the manner aforesaid.[236] For the most part this required communicating with persons in other countries and transmitting particulars of the principals to individuals and authorities overseas. Although such was the practice of the OFA, it still was not precluded from issuing offshore banking licenses without having conducted the relevant enquiries into the character and reputation of the applicants and the source of funding for the banking

[236] An examination of the records at the OFA revealed that due diligence enquiries were conducted on all the applicants for offshore banking licenses.

operations. The OFA would have been acting lawfully if it conducted no enquiries about applicants. This situation was untenable and severely handicapped international efforts in the fight against money laundering.

In SVG's response on 6th June, 2000[237] to the FATF's assessment, it was acknowledged that consideration was being given to amending Sections 13(4) and 22 and that the amendments were going to be made at the next sitting of parliament.[238] Those amendments were effectively passed in the House of Parliament on 20th July, 2000 in the case of the latter section, and 15th September, 2000 in the case of the former (see next chapter for further discussion). The mere fact that the next sitting of parliament was in July (exactly one month after SVG was blacklisted), 2000 and section 22 was amended by parliament at that sitting, was an unequivocal demonstration of SVG's efforts to cooperate in the fight against money laundering. It also highlighted not only the urgency by the FATF, for whatever reason, to name and shame SVG, but amplified its apparent disrespect for SVG's economic sovereignty and status as a sovereign nation (see chapter 6 for further discussion). It raises the questions why there was not any dialogue with SVG on the amendment that was necessary and/or why there was not an acknowledgement of SVG's continued efforts to assist the international community in the fight against money laundering? In the same way that dialogues were held with Turkey[239] and Austria to comply with the standards established by the FATF, why there

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[237] At pp 11-12 where it was stated that: "*Arrangements have already been made to repeal subsection 1(a)(b) and (c) of section 22 of the IBA 1996 at the next sitting of parliament.*"
"*The similar provision referred to in the report[meaning the FATF report] is section 13(4) of the IBA 1996. That section is also under consideration for amendment(my emphasis added).*"

[238] Section 13 (4) of the IBA was amended to provide as follows: "*For the purposes of subsection (3) the Offshore Finance Inspector shall have access to the name or title of an account of a customer and any other confidential information about the customer which is in the possession of a licensee and any account established by a licensee on behalf of any customer shall state the name and address of the customer and or the beneficiary of the account.*"

Section 22(1) IBA 1996 was amended to provide as follows: "*Subject to subsection (2), neither the Minister nor the Authority nor any person or entity acting under the authority of either, including the Offshore Finance Inspector, shall disclose or in any way remove from or transmit out of the State, any information relating to the identity or affairs of a customer of a licensee,*
which the Authority or any person or entity acting under the authority of the Authority has acquired in the course of his or its duties or the exercise of his or its functions under this Act."

[239] Levi M., & Gilmore W., "Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?" in Peith M., "Financing Terrorism" *2002 at p. 100* "*..When this tactic for increasing peer pressure fails additional steps may be taken, as happened with Turkey in 1995-96. Its failure, inter alia, even to enact basic anti-money laundering legislation had placed it in a position of serious non-compliance with the recommendations. Accordingly the FATF president first wrote to relevant ministers in that member country expressing concern. Subsequently, a high level mission was sent to Ankara to encourage the government to take urgent action or face the possibility of having more serious steps taken against it. Finally, on 19th September, 1996, the FATF issued a public statement in which it invoked its so- called recommendation 21 procedure against a member for the first time.*"

was not such a dialogue between the FATF and SVG, concerning the alleged negative impact of those provisions of its laws on the international anti-money laundering activities?

The other section to which the FATF referred was Section 3(3)(b)(iii) of the CRPA 1996. That section provided as follows:

> *"This Act has no application to the seeking, divulging or obtaining of confidential information - ...*
>
> *(b) by or to –*
>
> *(i) the Offshore Finance Inspector or a State police officer of the rank of Inspector or above, specifically authorised by the Minister in that connection, investigating an offence against the criminal laws of another State, other than an offence under that other State's tax or revenue laws, committed outside the State which offence, if it had been committed in the State would have been an offence against its criminal laws, so long as the confidential information sought, obtained or divulged is directly relevant to the investigation of the offence."*

The FATF contended that because the Offshore Finance Inspector required the prior approval of the Minister (in this case the Minister of Finance) before disclosing confidential information pursuant to a criminal investigation, that the approval in itself represented a restriction *"on any kind of international cooperation with the Offshore Finance Inspector."*[240] Furthermore, by limiting the information to be disclosed directly to the offence under investigation, the FATF concluded that this was also a prohibition on international cooperation. It is difficult to justify the conclusions reached by the FATF with regard to Section 3(3)(b)(iii) of the CRPA 1996. The Offshore Finance Inspector pursuant to Section 8(2) of the St. Vincent and the Grenadines Offshore Finance Authority Act (SVGOFA) 1996 is an employee of the OFA and his appointment had to be approved by the Cabinet of Ministers.[241] Although, the OFA is a statutory corporation,[242] in that it could sue and be sued[243] and had a certain degree of

[240] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 5

[241] Section 8(2) of the SVGOFA 1996 provided that: *"Subject to the prior approval of Cabinet, the Authority may appoint any natural person to the position of Offshore Finance Inspector under terms and conditions of employment that the Authority deems proper and necessary. The Offshore Finance Inspector shall subject to the supervision and control of the Authority Board, manage the day to day business of the Authority and of the duties of the Authority that are delegated to him by the Authority under this Act and under other Offshore Legislation."*

[242] Farrar J, Hannigan B, Furey N, Wyllie P., "Farrar's Company Law" 1998, at p 59. *"A statutory corporation is a company that is formed by the passing of an Act of Parliament."*

[243] Section 4(3) of the SVGOFA 1996 provided that:

> *"The Authority may sue and be sued in its corporate name and may borrow such monies as it may reasonably need from time to time. Service upon the Authority of any notice, order or other*

autonomy,[244] it nonetheless fell under the auspices of the Ministry of Finance for which the Minister of Finance had the ultimate responsibility.[245] It is therefore strongly arguable that the Minister of Finance, being a member of the legislature is a more suitable person to disclose the information, and that effectively, the Offshore Finance Inspector was designated to make such disclosures on the Minister's behalf. If the Minister of Finance was fit to ***(a)*** supervise the activities of the OFA via his connections with the OFA's Board of Directors; ***(b)*** approve and to present to the Cabinet of Ministers for its approval, the appointment of the Offshore Finance Inspector; and ***(c)*** present and debate in parliament any introduction of or amendment to the offshore finance legislation, it is rather strange that the seeking of his consent prior to the disclosure of confidential information should be seen by the FATF as a restriction to international cooperation. To the contrary, the seeking of the Minister's consent appeared to be consistent with the administrative structure of the OFA.

The FATF's other concern was the requirement that the information to be disclosed must be directly relevant to the offence that was being investigated. It was not clear why the FATF concluded that providing information that only related to the offence under investigation was prohibitive in the fight against money laundering. The mere fact that Section 3(3)(b)(iii) of the CRPA 1996 permitted the disclosure of confidential information in order to facilitate an investigation into an offence was indeed a recognition of the necessity for international cooperation. Moreover, in the light of the

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document shall be executed by delivering the same to or sending it by registered post addressed to the Secretary of the Authority at the office of the Authority."

[244] Section 4(1) of the SVGOFA 1996 provided that:

"The Authority shall be a body corporate having perpetual existence and a common seal. The rules and by-laws of the Authority Board shall be prepared by the Minister and approved by Cabinet. Such by-laws shall govern all meetings, functioning and operations of the Authority Board, and the provisions of such by-laws shall at all times be consistent with the provisions of this Act, with the procedures normally governing bodies corporate created by the State, and with the duties of the Authority contained herein and elsewhere in the laws of the State."

[245] Section 4(4) of the SVGOFA 1996 provided that:

"All annual operating expenses of the Authority, including salaries to be paid to employees of the Authority and to Authority Board members(if any), shall be funded by the Government of the State pursuant to an annual budget provided to Cabinet by the Authority Board as a normal part of the annual Government budget process..."

Section 9 of the SVGOFA 1996 provided that:

"Each International Business Company, International Banking Company, Registered Agent of International Trust registered under Offshore Legislation shall pay all fines, fees and penalties due to be paid by it under the terms of any Offshore Legislation to the Consolidated General Fund, marked as received from offshore services, and the registrar of International Business Companies and the Registrar of Trusts shall remit the same in such manner."

Section 10 of the SVGOFA 1996 provided that:

"The Minister, after consultation with the Authority may make rules for the better carrying into effect of the purposes and provisions of this Act."

fact that the FATF under criterion 16[246] concluded that *"this criterion is partially met"* without explaining why it was partially met, exemplified its own doubts as to its ability to substantiate its conclusion.

4.11 Criteria18[247]and 22[248]

Criteria 18 and 22 referred to the restriction that was imposed on the disclosure of tax related information and its impact on international cooperation. Although, criterion 18 specifically referred to the reporting of tax related suspicious transactions and criterion 22 dealt with the cases involving tax related offences, they are basically synonymous in their content. Accordingly, it seems appropriate to deal with both criteria simultaneously since the responses will be virtually identical.

The FATF concluded that SVG met both criteria 18 and 22. It justified the conclusions in the following identical manner:

> *"The Section 3(3)(b)(iii) of the Confidential Relationships Preservation (International Finance) Act 1996 specifically prohibits disclosure of information related to the money laundering offence with possible tax implications."*

The FATF was essentially objecting to the prohibition on the disclosure of confidential information which related to tax and revenue law matters as prescribed by Section 3(3)(b)(iii) of the CRPA 1996. To consider the justification for the conclusion, it is important to examine whether, by excluding tax matters, Section 3(3)(b)(iii) was inconsistent with legal principles that were recognised under international law or that the intention of the SVG parliament was to blatantly encourage the violation of the revenue laws of another State.

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[246] The FATF concluded that criterion 16 was partially met and justified that conclusion in the following manner: "*There is no explicit provision on this point, but all the powers of investigation of the Offshore Finance Inspector related to offences against the law of a foreign State are subject to prior authorisation of the Minister of Finance. In addition, possible investigation on a possible offence are strictly limited to the seeking of confidential information directly relevant to the investigation of that offence (see the Section 3, (3), b, (iii) of the Confidential Relationships Preservation (International Finance) Act of 1996. As a consequence, such kind of co-operation is only possible under very restrictive conditions.*" See the FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 6

[247] **Criterion 18: "Restrictive practices in international cooperation against money laundering between supervisory authorities or between FIUs for the analysis and investigation of suspicious transactions, especially on the grounds that such transactions may relate to tax matters."**

[248] **Criterion 22: "Refusal to provide judicial cooperation in cases involving offences recognised as such by the requested jurisdiction especially tax on the grounds that tax matters are involved. "**

There has been a plethora of court judgments supporting the principle that a state is not bound to recognise and enforce foreign revenue or penal laws.[249] Such was the position since the pronouncement by Lord Mansfield that *"no country takes notice of the revenue laws of another."*[250] This principle, as North and Fawcett indicated, *"remained a little nebulous"*[251] for sometime until the decision of the House of Lords in **Government of India v Taylor**[252] wherein it was reinforced as a well established principle under English law. Thereafter, it was widely accepted and applied by both English and foreign commonwealth[253] courts alike. The principle was so entrenched that efforts to indirectly enforce[254] matters relating to foreign revenue laws were thwarted by the courts. In the case of **Peter Buchanan Ltd and Macharg v McVey**[255] it was stated that; *"In every case the substance of the claim must be scrutinised, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue, it must be rejected.*[256]*"* Accordingly, by excluding tax and revenue matters from the requirements under which confidential information should be disclosed, the parliament of SVG was reinforcing by way of statute a well established principle of private international law.

This principle by being enshrined in statue, apparently obviated any discretion that the court previously had under common law, in dealing with a request of a revenue nature, made by a foreign State and relating to an offshore entity. Within recent times courts have resiled somewhat from this principle in the furtherance of a harmonious relationship among States.[257] Understandably, it does not augur well for the deepening

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[249] Holman v Johnson (1775) 1 Cowp 341; Government of India v Taylor [1955] AC 491: Re Lord Cable [1997] 1 WLR 7: A-G (New Zealand) v Ortiz [1984] AC 1- *'We do not sit to collect taxes for another country or to inflict punishments for it.' as per Lord Denning p 20);* Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368 : Re State of Norway's Applications (Nos. 1 and 2)[1990]1 AC 723; [1989] 1 All ER 745: United States of America v Inkley [1989] QB 255

[250] Holman v Johnson (1775) 1 Cowp 341, at 343

[251] North P., and Fawcett J., " Cheshire and North's Private International Law," Butterworths 13th edn. 1999, at p. 108

[252] [1955] AC 491 or [1955] 1 All ER 292

[253] Re Lambert and Pinto Sup Ct, Bahamas, Case No. 962 of 1986 : A-G (UK) v Heinemann Publishers Australia Pty Ltd (No. 2) (1988) 165 CLR 30 : A-G for the United Kingdom v Wellington Newspapers Ltd [1988] 1 NZLR 129: Clapham v Mesurier [1990-91] JLR 5 : Stutts v Premier Benefit Capital Trust [1992-93] CILR 605, where the Cayman Islands courts applied the principle in the following manner; *"The rule that the courts of no country execute the law of another applies not only to...crimes...but to all suits in favour of the State for recovery of pecuniary penalties for any violation of statutes for the protection of its revenue...and to all judgments for such penalties."*

[254] Brokaw v Seatrain UK Ltd [1971] 2 QB 476

[255] [1955] AC 516

[256] Peter Buchanan Ltd. And Macharg v McVey [1955] AC 516 at 529

[257] Re State of Norway's Applications (Nos. 1 and 2)[1990]1 AC 723; [1989] 1 All ER 745-" *where an English court assisted Norway a foreign State in obtaining evidence against one of its tax payers."* See also R v Charlton [1993] JLR 360 where the offshore jurisdiction of Jersey has followed the decision of Re State of Norway' Applications by declaring that requests for documents pertaining to revenue matters may not be considered in the same way as assistance to another country to collect taxes.

of relationships and international cooperation in the fight against international crime,[258] if States by applying the principle, blatantly encourage the violation of the revenue laws of other States.[259] This was evidently not the intention of the parliament of SVG but instead what was considered to be the norm in OFCs.[260] Interestingly, the State of St. Kitts and Nevis was removed from the FATF blacklist even though Section 34(1) (d) of the St. Kitts and Nevis PCA 2000 empowered the Comptroller of Inland Revenue to refuse assistance for information relating to foreign revenue law matters. As Antoine observed; *"To a large extent, offshore activity is aimed at achieving efficient tax avoidance or tax planning measures and not tax evasion."*[261]

With the rapid improvement in modern technology which has facilitated greater mobility of capital, labour and services and which has also been a source of vigour and gusto for organised crime and its attendant evils, States rather cooperate more fully and extend greater hands of friendship in order to apprehend and eradicate criminal elements from their respective societies. The principle of non-enforcement and non-recognition of foreign revenue laws, though well grounded in its jurisprudential traditions is now perceived as a hindrance to international cooperation, but it is yet to be placed into the annals of legal history as no longer good law. As North and Fawcett observed; *"The rule that no action will lie at the instance of a foreign State to enforce a revenue law does not mean, despite what Lord Mansfield said in Holman v Johnson, that such a law is to be totally ignored. Refusal to enforce it applies no disclaimer of its lawful existence, and circumstances may require that its existence be recognised."*[262] Accordingly, whilst the principle still remains good law, SVG could not be said to be under any legal obligation to assist a foreign country in revenue matters. It is also interesting to note that even if Section 3(3)(b)(iii) was repealed the principle will still exist under common law and may be applied by the courts if after weighing the consequences of disclosure the economic interests of SVG will be greatly affected[263] adversely.

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[258] Re Tucker a Bankrupt [1987-1988] Manx LR 8 – disclosure was made about information concerning a Jersey trust which was used in criminal conduct. G v S [1990-1991] CILR 341 at 354 where in response to a request for information in a drug related matter the courts held that in order to ascertain whether drug trafficking subsisted in the Cayman Islands the request *"...provided reasonable grounds for believing it to be in the public interest that the documents should be produced."*

[259] Euro-Diam Ltd v Bathurst [1990] 1 QB 1 at 39-40

[260] Art. 3 of the Antigua and Barbuda Mutual Legal Assistance Treaty (MLAT); Art 19(3) of the 1990 Cayman Islands MLAT with the USA where it provided that; *"...any conduct or matter which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes"* will be excluded

[261] Antoine R., "Confidentiality in Offshore Financial Law" Oxford 2002 p 46

[262] North P., & Fawcett J., "Cheshire and North's Private International Law," 1999, at p. 110

[263] Arawak Trust Co Ltd v Holden CA BVI, Civil Appeal No. 2 of 1994, decided 11th and 12th September 1994.

In determining whether to permit assistance in matters relating to foreign revenue laws the courts have at times carried out a balancing act.[264] They have been inclined to weigh up the interests of the country from whom the assistance is requested, against the public policy implications of refusing the assistance. Two of the fundamental pillars upon which the OFSS is established are taxation and confidentiality/privacy. Providing revenue law assistance to a foreign country about its tax payer's participation in the OFSS can be seen as undermining the existence of the sector and defeating the purpose for which it was established in the first place.[265] Providing the assistance would require disclosure of confidential information (the weakening of one pillar) and a violation of the reason for encouraging the investor to invest in the first place (the removal of the tax minimisation advantage); the overall effect being a loss in confidence in the OFSS and a reduction in the number of investors that are likely to participate in the investment opportunities that are available. This will not be considered as an acceptable course of action since generally, taxpayers were permitted by law to arrange their affairs in such a way that even though they acted within the law, they nonetheless minimise the incidence of tax.[266] This proposition was also followed by a Jersey Court which actually permitted the avoidance of English tax by the use of a financial structure involving an offshore trust that was registered in Jersey.[267] Due to the plenitude of court judgments in support of tax avoidance and the facilitation of offshore entities as the ingredients of offshore tax planning and financial engineering, the exclusion of revenue laws must not be seen solely within the context of offshore financial services as a cocktail or recipe for tax evasion. In this regard Antoine stated that:

> *"In tax planning situations, the ethical issue concerning the use of offshore law to facilitate criminality is removed, thereby exposing the single issue of national economic survival. Where offshore law protects tax avoidance/planning activity, thus defined, there is no legal basis upon which it can be questioned. Such legality assumes the morality and appropriateness of the offshore tax planning function. Coupled with the lack of harmony in fiscal laws between countries which affect particular, multinational*

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264 Royal Bank of Canada v Apollo Development (1985) LRC (Comm) 66 as per Georges LJ; *"The policy of preserving bank secrecy in the Commonwealth as enshrined in its laws must scrupulously be observed. Of equal importance is the need to ensure that it does not become a screen for facilitating fraud."*

265 Antoine R., "Confidentiality in Offshore Financial Law" 2002 at p. 50 where she stated that; *"There, is therefore, no legal or moral obligation of offshore or onshore states to assist onshore states (to their own detriment), in harnessing fiscal revenue by undermining the effect of offshore confidentiality laws. To the extent that this is a recognised principle of international law, offshore laws which discourage cooperation on these matters cannot be easily criticized. The rule helps to uphold national interests and public policy in offshore states."*

266 Duke of Westminster v IRC (1935) 19 TC 490 at p 520 (as per Lord Tomlin); See also Ayrshire Pullman Motor Service v IRC (1929) 14 TC 754 at pp 763-764 (as per Lord Clyde) :IRC v Brebner (1967) 43 TC at p 718H (as per Lord Upjohn)

267 In the Matter of Moody Jersey A Settlement [1990] JLR 264 at 266

> *companies, this provides a powerful justification for its existence and purpose and the tools, such as confidentiality, which seek to uphold it."*[268]

Moreover, certain States do not impose taxes on entities (onshore and/or offshore) and therefore may not consider tax evasion to be a crime.[269] Understandably, those States may not be favourably inclined to a reporting regime which includes the disclosure of information pertaining to foreign revenue laws. Offshore entities in SVG were exempt from the payment of taxes.[270] This therefore provided a cogent argument in support of the principle of exclusion of foreign revenue laws. As was demonstrated in chapter 1.1, SVG would have been threatening its own economic interest if it assisted another country to collect its taxes, since SVG did not impose any taxes on investments in offshore entities. This also raises the issue of non-intervention[271] of foreign States into the internal affairs of another sovereign State (see chapter 6.1.2).[272] SVG is prohibited under international law from dictating the fiscal policies of a foreign State. Equally, under the law of equality of States,[273] a foreign State is prohibited from intervening into the domestic economic policies of SVG. This does not however accord to SVG *carte blanche* to implement laws that are grossly offensive to the well being of another State[274] - such as encouraging tax payers to engage in tax fraud and tax evasion.[275] As

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[268] Antoine R., "Confidentiality in Offshore Financial Law" 2002 at p. 48

[269] Switzerland, Bahamas, Cayman Islands.

[270] See Sections 99 and 100 of the IBC Act 1996: Section 20 of the IBA 1996 : Section 62 of the IFA 1996 : Section 48 of the IIA 1998 : Section 39 of the MFA 1997 as amended in 1998

[271] Warbrick C., "States and Recognition in International Law," in Evans M., "International Law" Oxford 2003 at p. 218; Cassese A., "International Law," Oxford 2002 at pp. 98 -100 ; Qureshi A., "International Economic Law" Sweet & Maxwell 1999 at pp. 34-38 : Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law- Towards international discipline" Juris Publishing 2000 at p. 5 : Schermers H., "Different Aspects of Sovereignty" in Kreijen G., "State Sovereignty and International Governance" Oxford 2002 at p. 185; Brownlie I., "Principles of Public International Law" Oxford, 5th edn. 1998 at pp. 289-290:

[272] Re the Matter of H [1996] CILR 237 at 243

[273] Brownlie I., "Principles of Public International Law" 1998 at p. 289 where it is stated that; *"The principle corollaries of the sovereignty and equality of States are: (1) a jurisdiction, prima facie exclusive, over territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor."*

Art. 2 para 7 of the United Nations Charter provides: *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."*

[274] Hinterseer K., "Criminal Finance- The Political Economy of Money Laundering in a Comparative Legal Context," 2002 at p. 76; Commenting on the Economic Development Assistance Act 1995 in the Seychelles, Hinterseer stated that; *"Under the EDAA individuals with at least $10 million were given two incentives to invest in the islands. First within the Seychelles, investors will receive immunity from criminal prosecution brought against them by any party. However this did not apply to proceedings initiated by the Seychellian authorities in relation to acts of violence or cases of drug trafficking within the Seychelles. Second a guarantee that assets located in the Seychelles would be immune from any confiscation or seizure order sought to be enforced against the investor by a foreign government..."*

was demonstrated above that was never the intention of SVG. Interestingly, the Protocol to the MLAT which was executed by SVG and the USA on 8th January, 1998 excluded assistance 'for civil and administrative tax matters that are unrelated to any criminal tax matter' but permitted the disclosure of criminal tax matters. It provided as follows;

> *"Further although the Treaty has no general dual criminality requirement, our governments understand United States law and the law of St. Vincent and the Grenadines to be consistent with respect to criminalizing wilful, fraudulent misconduct by private persons in representations to the government. As a result, the conduct underlying a United States government request to St. Vincent and the Grenadines for assistance in a criminal tax evasion case would in all likelihood also be criminalised under the law of St. Vincent and the Grenadines."*

Banking secrecy laws have traditionally restricted the disclosure of tax information. Moreover, in certain countries tax evasion is not a crime.[276] Therefore, it would be excessive to make tax evasion a crime in a country where tax is exempt. Bearing in mind that a State's power is restricted to its subjects within its territory, instituting laws against tax evasion in a country or sector where tax is exempt can only but have an extraterritorial effect which is not only unacceptable under international law but also in the case of SVG otiose.[277] Therefore, on the basis of the foregoing it is difficult to see how the conclusions of the FATF on criteria 18 and 22 can be effectively substantiated.

4.12 Criterion 23[278]

This criterion assessed the adequacy of the human and technical resources that were necessary to conduct investigations. Insofar as SVG's resources were concerned the FATF concluded that:

> *"The Offshore Finance Authority and the office of the Offshore Finance Inspector are comprised of 8 staff members, which is far from sufficient. In accordance with that fact, the CFATF mutual evaluation report leads to the conclusion that St. Vincent and the Grenadines has devoted no human or material resources specifically to anti-money laundering efforts."*[279]

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[275] Controller and AG v Davison [1996] 2 NZLR 278; Pete Marwick v Davison [1996] 2 NZLR 319; cases in which tax fraud required the disclosure to be made.
[276] E.g. Switzerland
[277] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law- Towards international discipline" 2000 at pp 51-53
[278] **Criterion 23: Failure to provide the administrative and judicial authorities with the necessary financial, human or technical resources to exercise their functions or to conduct their investigations.**
[279] FATF- Report on St. Vincent and the Grenadines Against the Criteria for Assessing Non-Cooperative Countries-20th June 2000. p 7

The issues raised under this criterion were discussed earlier in this chapter and require no further amplification except to say that once again the FATF failed to substantiate its claims. It concluded that the staffing complement of 8 (it should have been 9 including the Offshore Finance Inspector) is *"far from sufficient."* What was therefore the adequate level of staffing that was required? How did the FATF determine that the staffing complement was insufficient? Whose responsibility was it to determine the desired level of staffing that was required? What were the difficulties that the OFA encountered as a result of the staffing complement of 9? How does a staffing complement of 9 affect international cooperation in the fight against money laundering? It is therefore grossly inaccurate to state that *'St. Vincent and the Grenadines has devoted no human or material resources specifically to anti-money laundering efforts.'*

The OFA and the anti-money laundering unit to which cash transaction reports were submitted; the law enforcement officials who conducted further investigations on those reports and also received suspicious transaction reports and; the office of the Director of Public Prosecution that determined whether or not to proceed to trial on the basis of the evidence are they not human resources? Are they not remunerated for the functions that they perform? Those are the issues that the FATF should have addressed before arriving at its conclusion. Moreover, it is important to note that SVG was not perceived as a favoured money laundering destination and was therefore ranked as medium risk country in so far as money laundering was concerned (see chapter 3.15).

In chapter 2.4 it was established that money laundering was rife in FATF member States and the criminal activities that generated the proceeds of crime actually occurred in those States as well. Nonetheless, the FATF did not consider it relevant to question the adequacy of the resources that were used by its member States to combat money laundering. In the light of the extent of the criminal and money laundering activities that were estimated to have taken place in FATF member countries, why did the FATF not question the adequacy of the resources, human, financial and otherwise that were utilised to combat crime? Had the FATF shown a willingness to treat each country fairly in its efforts to combat money laundering activities, its quest for international cooperation in the fight against global money laundering would have been more easily achieved.

4.13 Criterion 24[280]

This criterion addresses the issue of corruption in the institutions and the individuals that were responsible for the dispensation of justice and the governance of the anti-money laundering initiative.

The separation of private sector individuals from public sector activities can be paramount in small countries such as SVG. There can be economic, social and political disadvantages arising especially where a private sector individual or institution may be as economically well off as the entire country itself. SVG experienced such disadvantages in 2000 when the OFA revoked[281] the offshore banking licenses of Nano and Sons 1146 Private Bankers Ltd and New Bank Ltd which were purported to have been owned by the Nano family.[282] In retaliation to the revocation of the licenses the putative owner Mr. Thierry Nano wrote to the OFA and the government demanding the repayment of the monies that it allegedly spent to finance the drafting of the 1996 offshore legislation and accusing government officials of receiving monies from the bank prior to 1996.[283] The revocation of the banking licenses may well have been a major factor in the 2001 general elections campaign and which may have led to the government's defeat at the polls(see also chapter 5.13).[284] The nature and size of some commercial entities have at times accounted for the extent to which they can influence the political directorate and by extension the economies of countries. As Stern has pointed out;

> *"Moreover, transnational firms are major actors in the contemporary international relations, their importance being comparable to the economic weight of many States. As an example, it may be recalled that the annual turnover of ITT was higher than the Gross National Product of Chile at the time President Allende was overthrown, and it has been contended that ITT contributed to that event. Even such an extreme outcome does not occur, it is quite clear that the power of multinational corporations competes with the power of States and can hamper, if not their political sovereignty, at least their economic sovereignty over their natural resources and economic wealth."*[285]

[280] **Criterion 24: Inadequate or corrupt professional staff in either governmental; judiciary or supervisory authorities or among those responsible for anti-money laundering compliance in the financial services sector.**
[281] Information obtained from the Records at the Offshore Finance Authority.
[282] www.geodrugs.net, "One Money-Laundering Case with Three Governments involved," Geopolitical Drug Newsletter, No. 9 – June 2002, pp. 1-4 at p. 2-4 for a history of the Nano family.
[283] Ibid at p. 3
[284] Ibid ; where it was stated that the Nanos contributed approximately one million dollars to the ULP campaign which was ridden with money.
[285] Stern B., "How to Regulate Globalisation?" in Byers M., "The Role of Law In International Politics, Essays In International Relations And International Law," Oxford, 2001 at p. 248

Chapter 4. "An Evaluation of the Reasons for the Blacklisting of SVG by the FATF."

One of the main concerns about organised crime is its infectious character. Whether through fear, cupidity, duress of circumstances or abject poverty, people are at times infected with the gains to be derived from criminal activity. In many instances they turn to crime because the opportunity presents itself and man's fallibility becomes tested.[286] Although the anti-money laundering initiative is gaining currency worldwide, in this New International Economic Order[287] where modernization has taken root globally, there is still in existence a range of opportunities available to commit crimes.[288] Vold, Bernard and Snipes argued that; *"These crimes, therefore require the convergence in time and space of a motivated offender, a suitable target, and the absence of a capable guardian (police) to prevent the crime."*[289] Criminologists from the Routine Activities School of Criminology argue that by removing the opportunity to commit crime there will be a lessening of its occurrence.[290] Criterion 24 sought to remove that opportunity. In that regard it provided a yardstick by which to assess the extent of any weaknesses in the regulatory and supervisory framework which could be exploited by those whose responsibility it is to uphold law and order and cooperate in the international anti-money laundering efforts. Accordingly, the FATF concluded that:

> *"The Board of the Offshore Finance Authority, which is responsible for the regulation and oversight of the St. Vincent and the Grenadines offshore financial services sector, includes four private sector representatives. This can lead to significant conflicts of interest. It is unwise to involve at this level in the supervision process, and especially in the control of the supervision process, individuals who are or can be subject, due to their profession, to this supervision."*

It is important to note from the outset that the OFA only had four directors (as opposed to five as stated by the FATF), two were from the public sector and two from the private sector.[291] Although SVG's response indicated that greater expertise in the offshore business was to be found in the private sector as opposed to the public sector,[292] the

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[286] Lilly R., Cullen F., and Ball R., "Criminological theory-Context and Consequences," Sage Publications, 3rd edn. 2002 at p 234 ; *"It has long been pointed out that even if offenders desire to commit crimes, they cannot do so unless the opportunity to break the law is present."*

[287] Qureshi A., "International Economic Law," Sweet & Maxwell, 1999, at pp 35-36 para 2-07

[288] Cohen L., & Felson M., "Social Change and Crime Rate Trends: A Routine Activity Approach," American Sociological Review 44: 588-608(1979)

[289] Vold G., Bernard T., & Snipes J., "Theoretical Criminology," Oxford, 5th edn. 2002 at p. 206.

[290] Ibid at p. 196 where it is stated that : *"... in 1978 Cohen and Felson proposed the "routine activities" approach, which argued that rationally calculating potential offenders respond to opportunities to commit crimes and that these opportunities are systematically related to the "routine activities" by which people live their lives. This concept led to policy recommendations to limit criminal opportunities rather than increase the deterrent effect of criminal of criminal justice policies."*

[291] Caribbean Financial Action Task Force- Mutual Evaluation Report on St. Vincent and the Grenadines, 2nd July, 1997, p 11

[292] *"There are other aspects of the Authority's operations for example marketing, administration and finance that will require the expertise of persons who would have acquired very worthy experience from being in the Private Sector. Small Island economies like Saint Vincent and the Grenadines do not have*

FATF's conclusion was not without merit. But it would have been more appropriate for the FATF to suggest an adjustment to the policy of Board appointments. Such a policy should have excluded from holding positions on the Board, those persons who were subject to the supervision of the OFA. To exclude persons from the private sector altogether, would significantly reduce the number of eligible and competent persons that were available to serve as Directors on the Board of the OFA.

4.14 Criterion 25[293]

Criterion 25 was introduced to assess whether there was in place an efficient mechanism for the collection, analysis and dissemination of suspicious transaction reports. In some countries the institution that processes suspicious transaction reports are referred to as Financial Intelligence Units (FIUs), whereas in other countries they are referred to by different names. For example, in England, the National Criminal Intelligence Service (NCIS) and in the USA, the Financial Crimes Enforcement Networks (FINCEN) function as FIUs. The name is not as important as the efficiency with which the entire system of reporting suspicious transaction operates and the effectiveness of the processing mechanism by the FIU.

The FATF concluded that; "*There is no central unit for the collection, dissemination and analysis of suspicious transactions reports in St. Vincent and the Grenadines.*" Accordingly, it was held that SVG fell within Criterion 25. The question that seems to warrant further clarification is, what does the FATF mean by a centralised unit? Moreover, how does not having a so called centralised unit impede the anti-money laundering efforts? The FATF in its 40 Recommendations only made mention of '*competent authorities*,'[294] but did not refer to FIU or even defined[295] what was meant by FIU. A central[296] unit[297]

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the luxury given the relatively small human resource base of restricting itself to the utilization of Public Sector Officials only in enhancing its ability to effectively manage the Offshore Finance Sector." p 18

[293] **Criterion 25 – Lack of a centralised unit (i.e., a financial intelligence unit) or of an equivalent mechanism for the collection, analysis and dissemination of suspicious transactions information to competent authorities.**

[294] Stessens G., "Money Laundering-A New International Law Enforcement Model," Cambridge, 2000, at p. 183.

[295] Ibid p 184 where Stessens claimed that the definition of a FIU came from the Egmont Group which defined FIU as "*A central national agency, responsible for receiving (and, as permitted, requested), analysing and disseminating to the competent authorities disclosures, of financial information; (i) concerning suspected proceeds from crime or (ii) required by national legislation or regulation, in order to counter money laundering.*"

[296] Oxford Reference Dictionary revised 2nd edn. 2002 a p 236 defines central to include : "*Chief, essential, most important*"

within the context of the FIU is the main or chief institution or device for the collection of suspicious transactions from individuals, financial and other institutions, and the assimilation, processing and dissemination of such information where appropriate, to law enforcement officials. FIUs play a major role in the anti-money laundering efforts by determining to a large extent and from the reports received the evidence that is necessary for the monitoring and apprehension of those involved in criminal conduct.[298]

Pursuant to Section 21(3) of the DTOA 1993, persons who suspected or knew that funds were derived from or used in connection with drug trafficking were encouraged to report the matter to a police officer. Section 51(2) of the PCA 1997, as amended, also required a financial institution with information on an account to report that information to a police officer or Director of Public Prosecution where that institution had reasonable grounds to believe that the information in its possession may have led '*to an investigation or prosecution of a person for an offence.*' Section 51(3) on the other hand required financial institutions to report cash transactions in excess of $10,000 to the OFI in cases involving an offshore company and to '*a special anti-money laundering unit or official designated by the Minister of Finance*' in all other cases involving cash transactions. Essentially, except for the cash transactions reporting mechanism the regulatory framework in SVG required the reporting of dubious transactions to the police, which it is strongly contended was a central unit. Moreover, pursuant to Section 2 of the Mutual Assistance in Criminal Matters (Central Authority Designation) Order 1999 the Director of Public Prosecution is designated the central authority for the purposes of the Mutual Legal Assistance in Criminal Matters Act 1993.

4.15 *Conclusion*

The FATF's assessment of SVG was superficial. It did not consider all the laws that were implemented by SVG and SVG's continued efforts to ensure that money laundering activities did not take root. The plethora of laws that SVG introduced to combat organised crime and to meet its international obligations were given scant regard by the FATF. A process of dialogue between the FATF and SVG would have been much more effective. In the same way that dialogue between the FATF and its

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297 Ibid at p 1575 defines central to include; *"a device with a specified function forming part of a complex mechanism."*

298 Mitsilegas V., "New Forms of Transnational Policing: The Emergence of Financial Intelligence Units in the European Union and he Challenges for Human Rights," JMLC, Vol. 3, No.2, 1999, at pp 147-150.

member countries was a condition to ensuring satisfactory implementation of the FATF' 40 Recommendations, further dialogue with SVG would have resolved the deficiencies that were identified in its assessment of SVG. For the most part the evaluation of the FATF's assessment of SVG was therefore factually unfounded, based on legal misapprehension and discriminatory. Moreover, some of the criteria were unnecessary and the responses thereto were exaggerated. Accordingly, there was no justifiable basis for blacklisting SVG as an uncooperative jurisdiction in the fight against money laundering.

Chapter 5. "SVG's Legislative Efforts After the Blacklisting."

5.0 *Introduction*

SVG continued revising its offshore and money laundering legislation following its inclusion on the FATF's list of non-cooperative countries and territories in June 2000. This chapter will only be concerned with those legislative revisions that were identified by the FATF as being necessary for SVG to make, in order for it to be removed from the FATF's blacklist. In that regard, only the relevant legislation that were introduced during the period after the blacklisting of SVG and up to 19th June, 2003[1] when SVG was removed from the FATF's blacklist, will be given consideration. Incidentally, SVG was removed by the OECD from its list of uncooperative tax havens on 18th April, 2002 after having given a commitment[2] to the OECD to address what the OECD considered to be "harmful tax practices."[3]

Amendments were made to the IBA 1996, the IBC 1996, the CRPA 1996 and the ITA 1996. Ultimately, the PCA 1997 and CRPA 1996 were repealed. They were replaced by the Proceeds of Crime and Money Laundering (Prevention) Act ('PCMLA') 2001 and the Exchange of Information Act (EIA) 2002 respectively. Further legislative measures established a Financial Intelligence Unit (FIU), the regulatory powers of which were outlined in the Financial Intelligence Unit Act (FIUA) 2001. Each of the aforesaid legislative measures will be discussed not only to ascertain their effectiveness to the money laundering initiative but also to examine whether there were any significant departures from the legislative regime which was in existence prior to June 2000 when SVG was placed on the FATF's blacklist.

In that regard, it will be argued that the regulatory and supervisory regime which led to the removal of SVG from the FATF's blacklist was not substantially different from the regime which was in existence prior to the blacklisting of SVG. Moreover, some of the legislative differences that were introduced after the blacklisting were already scheduled to be done and it was communicated to the FATF that they were to be introduced at the next sitting of parliament[4] which was approximately one month after the publication of the FATF's blacklist. It will also be argued that due to the intense pressure from the FATF and the adverse economic and other implications which ensued from being

[1] FATF Report, "Review to Identify Non-Cooperative Countries and Territories: Increasing The World-Wide Effectiveness of Anti-Money Laundering Measures," 2003.
[2] See chapter 6.4 and 6.5.7
[3] www.oecd.org
[4] See chapter 4.10

blacklisted, SVG appeared to have gone too far in its legislative efforts to satisfy the FATF's anti-money laundering requirements. Certain provisions of the PCMLA 2001 were not consistent with the 1979 Constitution. Accordingly, it will be demonstrated that the FATF's blacklisting of SVG could not have been justified in the first place when the changes that SVG made to be removed from the blacklist were mainly cosmetic.

5.1 *Amendments to the IBA 1996*

The IBA 1996 was amended in 2000 during two sittings of parliament. During the parliamentary debate on 20th July, 2000 (one month after SVG was blacklisted) amendments were made to Sections 4(2) and 22 of the IBA 1996. The other amendments (e.g. Section 13(4)) were made on 15th September 2000. SVG in its response to the FATF's assessment at a meeting in Miami[5] had expressly indicated to the FATF that it had already commenced the process of drafting legislative amendments to Sections 13 and 22 of the IBA 1996 and that those amendments were going to be introduced to the House of Parliament the following month.[6] It kept its promise but the FATF apparently was not interested in the intentions of a country to which it evidently had the power to dictate. The amendment to Section 4(2) empowered the OFA to ascertain, by making the relevant enquiries, any information that it required about an applicant for a banking licence.[7] Although the previous legislative regime did not impose an obligation on the OFA to conduct such due diligence enquiries before, during and after a license was granted, the OFA was nonetheless conducting those enquiries[8] for all applications for the licensing or registration of offshore financial institutions.[9] In essence, the amendment to section 4(2) of the IBA 1996 only provided a statutory requirement for what was already a standard practice in the processing, regulating and supervision of offshore financial institutions.

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[5] See chapter 4.1

[6] See criteria 15 and 16 in chapter 4 .10

[7] The amended Section 4(2) of the International Banks Act provided that; *"An application under section (1) shall be filed with the Offshore Finance Inspector, shall contain the particulars set out in the Schedule hereto, and shall be accompanied by the fee prescribed in regulations hereunder. The Offshore Finance Inspector shall review the application to ensure it contains the required information and is accompanied by the proper fee and shall forward the complete application to the Authority after,*

(i) conducting such enquiries as may be considered necessary;

(ii) communicating with such persons, bodies or authorities as required:

notwithstanding the provisions in this or any other legislation."

[8] See criteria 15 and 16 in chapter 4.10.

[9] Offshore financial institutions are international banks, international insurances and mutual funds.

The amendment to Section 22 of the IBA 1996 removed the restriction that was imposed on the disclosure of information concerning a licensee and an applicant for a licence.[10] Instead, the restriction on the disclosure of information was now limited to the disclosure of information about *"the identity or affairs of a customer of a licensee."*[11] The amendment to Section 13(4)[12] essentially granted permission to the OFI to have access to the names and titles of the accounts of customers of licensees. Prior to that amendment the OFI only had access to those records pursuant to an order of the court.[13] Those two amendments were significant to the anti-money laundering efforts of the FATF but it is nonetheless important to note that SVG had decided to make those amendments prior to it being blacklisted and the FATF was aware of that decision prior to the publication of its blacklist in June 2000.

Further amendments were made to the IBA 1996 on 30th April, 2002 and 29th May, 2002 to introduce house keeping requirements. The most significant and relevant[14]amendment was the inclusion of the ECCB[15] in the licensing and supervision of offshore banks.[16]Moreover, section 2 of the IBA was amended to expressly indicate that bearer share companies were not eligible to apply for a banking license. Even without that amendment such companies could not have applied for and be granted an international banking license due to the application requirements that were stipulated in the schedule to the IBA 1996 and the IBR 1996.[17]

5.2 *The Financial Intelligence Unit*

The Financial Intelligence Unit Act (FIUA) 2001 became effective on 18th December, 2001. It provides for *"the establishment of a Financial Intelligence Unit which will be the national centralised unit in Saint Vincent and the Grenadines for the collection, analysis and*

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[10] See chapter 4.10

[11] Section 22 of the IBA 1996 (as amended) provided that: *"Subject to subsection (2), neither the Minister nor the Authority nor any person or entity acting under the authority of either, including the Offshore Finance Inspector, shall disclose or in any way remove from or transmit out of the State, any information relating to the identity or affairs of a customer of a licensee."*

[12] See note 232 in chapter 4

[13] See criteria 4 and 5 in chapter 4.5

[14] i.e. relevant to the FATF money laundering initiative.

[15] See note 33 in chapter 4.2

[16] Section 4(2a) of the IBA 1996 (as amended) provided that: *"The Offshore Finance Inspector shall review the application to ensure that it contains the required information and is accompanied by the prescribed fee and shall then forward completed applications to the Authority after;*

(a) submitting an application to the Central Bank for its review...

Section 15(2c) of the IBA 1996 (as amended) provided as follows: *"Copies of the audited accounts and the quarterly returns must be submitted to the Central Bank, through the Authority."*

[17] See discussion in chapter 4.3 under the paragraph headed criterion 2.

dissemination of the suspicious transaction information to competent authorities.'[18] The Financial Intelligence Unit (FIU) is charged with the responsibility of collecting suspicious transaction reports from financial institutions and persons that were engaged in relevant business activities, as required under the Proceeds of Crime Money Laundering (Prevention) Act (PCMLA) 2001.[19] It can be categorised under the independent model[20] of FIUs because of its independence from the police and from the financial institutions and relevant business activities that were required to provide it with information.[21] The FIU may demand from any financial institution or person engaged in relevant business activity, information that it considered relevant to the commission of a relevant offence.[22] Any person who fails to provide the information requested has committed an offence punishable by imprisonment of a maximum of two years and or a fine not exceeding $50,000.[23]

The responsibilities of the FIU also extend to executing agreements with other FIUs but it is nonetheless required to obtain the advice of the Minister of Finance before disclosing information to foreign FIUs.[24] It seems rather strange that the FIU was introduced because of the requirements of the FATF's initiative,[25] yet it has retained a similar restriction that was imposed on the Offshore Finance Inspector under Section 3(3)(b)(iii) of the Confidential Relations Preservations (International Finance) Act ('CRPA') 1996.[26] The FATF concluded that due to that restriction, criterion 16 was partially met.[27] The restriction under the FIUA 2001 provides as follows:

> *"Without limiting the foregoing and notwithstanding any other law to the contrary the Financial Intelligence Unit...*
>
> > *(e) may provide information relating to the commission of an offence to any Foreign Financial Intelligence Unit. Subject to any conditions as may be considered appropriate by the Director on the advice of the Minister.*
> >
> > *(f) may enter into any agreement or arrangement in writing, with a Foreign Financial Intelligence Unit which the Director on the advice of the Minister considered necessary for the discharge of the functions of the Financial Intelligence Unit."*[28]

[18] The preamble of the Financial Intelligence Unit Act 2001.
[19] Sections 4(1) and 4(2)(a)
[20] Mitsilegas V., "New Forms of Transnational Policing: The Emergence of Financial Intelligence Units in the European Union and the Challenges for Human Rights," JMLC, vol. 3 No. 2. 1999, at pp 147-150.
[21] Section 4(1) of the FIUA 2001
[22] Section 4(2)(b) and also section 2(2) of FIUA 2001 where it is provided that relevant offence and relevant business activity have the same meaning that was given under the PCMLA 2001.
[23] Section 3 of the FIUA 2001
[24] Section 4(2)(f) of the FIUA 2001
[25] See chapter 4.14
[26] See chapter 4.10
[27] See discussion below under the Subheading Exchange of Information Act and see also the discussion in chapter 4 under paragraph headed criteria 15 and 16.
[28] Sections 4(2)(e) and (f) of the FIUA 2001.

Essentially, the section prohibits the disclosure of confidential information to a foreign State in connection with a criminal investigation without the authorisation of the Minister. It is difficult to see how sections 4(2)(e) and (f) of the FIUA 2001 differ from section 3(3)(b(iii) of the CRPA 1996 in so far as the disclosure of information to a foreign State is concerned. The requirement that the prior advice of the Minister of Finance must be obtained before any information is disclosed to a Foreign Financial Intelligence Unit also extends to circumstances where information relating to the commission of an offence is to be disclosed to the Commissioner of Police.[29] This further reinforces the independence of the FIU and distinguishes its functions from those of the police.

Under section 3(1) of the FIUA 2001 the Minister of Finance is empowered to appoint the staff of the FIU which should include, the Director, an attorney at law, a public accountant, an indeterminate number of police officers and any other person as the Minister of Finance considers suitable. It is arguable that the staffing requirement consequent upon the establishment of the independent model FIU is no different from the staff that existed prior to the introduction of the FIUA 2001. Although the FIU currently has a Director, it is important to note that the person holding that office was the former Assistant Director of Public Prosecutions.[30] Moreover, the attorney-at-law was also transferred from the Department of Legal Affairs. There is no public accountant on staff but the FIU seeks the services of one when it is necessary to do so. It therefore appears that had the police model of FIUs been maintained the staffing compliment would have effectively been the same, since the Assistant D.P.P, the attorney-at-law and the police officers would still have been involved in the process of determining whether or not a money laundering charge should be proffered.

Since the establishment of the FIU in 2001, and up to the June 2003 (when SVG was removed from the FATF's blacklist) no one has been convicted of a money laundering offence but 100,068.00 Eastern Caribbean Dollars (US$37,225.00 equivalent) was forfeited. The FIU had also received 190 suspicious transaction reports.[31] It is however difficult to form any conclusions on the state of affairs in SVG due to those statistics. In

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[29] Section 4(2)(d) of the FIUA Act 2001 provided that: *"Without limiting the foregoing and notwithstanding any other law to the contrary the Financial intelligence Unit;*

> *(d) shall provide information, subject to such conditions as may be determined by the Minister to the Commissioner of Police where the information may relate to the commission of an offence."*

[30] Information from records of the FIU.

[31] Information from records of the FIU.

chapter 3 SVG was mentioned as a low to medium priority country for money laundering and the figures appeared to be consistent with that conclusion. This strengthens the argument that the FATF's blacklisting of SVG was not only unjustified but also premature to say the least.

When the FIUA 2001 is compared with what previously existed, it is noticeable that there is little difference. A FIU department[32] was previously established in the police force for the purposes of reviewing reports of suspicious transactions from financial institutions pursuant to Section 51 of the PCA 1997.[33] Under the amended Section 51 of the PCA 1997[34] financial institutions were required to submit reports on cash transactions in excess of 10,000 United States Dollars or its equivalent. These reports were required to be submitted to and analysed by the OFA and where appropriate the anti-money laundering unit or an official[35] who was designated by the Minister of Finance.[36] If after having analysed those reports there was a suspicion that money laundering was involved, they were transferred to the police to commence the investigation process.[37] In this way the police were not lumbered with a large number of unnecessary reports. Moreover, the expertise at the OFA and the anti-money laundering unit was more suited to the type of analysis that was required to be conducted on the reports.[38]

One of the fundamental differences between the two systems is that the previous structure was somewhat of a hybrid[39] but it substantially followed the police model[40] of FIUs. This meant that the police with the assistance of the office of the DPP collected and analysed the details of the reports that were not cash transactions reports and determined whether there was sufficient evidence to further investigate or proffer

[32] St. Vincent and the Grenadines Parliamentary Debate 27th August, 1999 at p 45.
[33] See chapter 4.7
[34] See chapters 3.12 and 4.7
[35] St. Vincent and the Grenadines Parliamentary Debate 27th August, 1999 pg 46 where the Attorney General briefly explained the process through which cash transactions traverse before any further investigation is conducted.
[36] Ibid : See also Section 51(2) of the PCA 1997 (as amended) (now repealed)
[37] St. Vincent and the Grenadines Parliamentary Debate 27th August, 1999 pp 45- 46 where the Attorney stated referring to the OFA and the Anti-money laundering Unit that: "The intention is that these reports will be looked at by this unit...and put their collective wisdom and experience together to determine whether these transactions look like money laundering transactions, and if that was determined then the matter would be investigated by the prosecuting authorities."
[38] St. Vincent and the Grenadines Parliamentary Debate 27th August, 1999 pp 45- 46
[39] This was because some reports went to the police and some to the anti-money laundering unit and the OFA (Offshore Finance Authority).
[40] Mitsilegas V., "New Forms of Transnational Policing: The Emergence of Financial Intelligence Units in the European Union and the Challenges for Human Rights," JMLC, Vol. 3 no. 2. 1999, at p 151

charges. There was however no legislation which determined how the department should function. It was established as another department in the police force. It was essentially akin in structure to the National Criminal Intelligence Service in England.[41]

5.3 *PCMLA 2001 Money Laundering Offences*

The PCMLA 2001 was passed in the House of Parliament on 21st November 2001 and came into effect on 28th December, 2001. It effectively repealed the PCA 1997 but surprisingly retained the offences that were provided under sections 59, 60 and 61. The reasons for repealing the PCA 1997 were mentioned by the Prime Minister Dr. Ralph Gonsalves during the parliamentary debate of the Proceeds of Crime Money Laundering (Prevention) Bill (PCMLB) 2001. He stated that:

> *"...it is well known that St. Vincent and the Grenadines is on the so-called FATF blacklist and there are many reasons why we are on the black list. There are matters of legislation which do not quite capture the offence of money laundering and associated offences, also there is in the view of the FATF a regulatory framework both in its legal character and in its day to day practical manifestation that this regulatory framework is not of a quality which measures up to international standards. All these are among the reasons given, originally for the blacklisting. There are many more details...that would no doubt emerge in the debate...Suffice to say...that this blacklisting has been detrimental to St. Vincent and the Grenadines. There are some who do not mind the blacklisting because the conditions of the wild-west favours them, well that may be so but it does not favour St. Vincent and the Grenadines."*[42]

It seems clear from the statement that the reason for the repeal of the PCA 1997 and the introduction of the PCMLA 2001 was to facilitate the speedy removal of SVG from the FATF's blacklist. This objective will be examined later in the chapter when discussing issues relating to the enforcement of the money laundering legislation. It was also significant to the extent that it may well have justified the presumption that reluctant compliance with the FATF's initiative may well have been viewed as a precondition to the preservation of economic aid from certain FATF member countries. Essentially, the government of SVG may well have instituted legislative and other changes not because it felt that it was the right thing to do or because it considered that its regulatory and supervisory framework was inadequate but because it may well have been fearful of losing economic aid. Whether or not the strict enforcement of the provisions of the PCMLA 2001 is as significant as the reasons for its implementation is still very much under consideration.

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[41] Ibid

[42] St. Vincent and the Grenadines Parliamentary Debate Wednesday 21st November, 2001 at p 3.

Chapter 5. "SVG's Legislative Efforts After the Blacklisting."

As was noted above the PCMLA 2001 was introduced because the former PCA 1997 was considered to be inadequate and was therefore ineffective in dealing with the money laundering phenomenon. The confiscation and enforcement measures in the PCMLA 2001[43] have remained basically the same as they were under the PCA 1997.[44] The forfeiture provisions have nonetheless been scaled down considerably from thirteen relatively long sections in the PCA[45] which outlined the procedure to just one section in the PCMLA 2001.[46] There are other administrative amendments but except for the change in the forfeiture procedure which may be exposed to a challenge under the 1979 Constitution (see below), there is nothing that substantially or radically changes what existed under the PCA 1997. The major changes were heralded as the new money laundering offences which amounted to five in total. Section 41 provides for the concealment and transference of the proceeds of criminal conduct;[47] section 42 provides for the arrangements made with another to retain and control the proceeds of criminal conduct of the other person for the purpose of benefiting that person;[48] section 44(2) requires the disclosure of information about drug money laundering;[49] Tipping off fell

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[43] See Sections 6-34 of the PCMLA 2001

[44] See Sections 16-22 of the PCA 1997

[45] See Sections 3-15 of the PCA 1997

[46] See Section 50(1) of the PCMLA 2001

[47] Section 41(1) of the PCMLA 2001 provides: *"A person commits an offence if he*

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct, or

(b) converts or transfers that property, brings it into or moves it from Saint Vincent and the Grenadines;

for the purpose of avoiding prosecution for a drug trafficking or relevant offence or the making or enforcement in his case of a confiscation order."

Section 41(2) – *"A person commits an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he*

(a) conceals or disguises that property, or

(b) converts or transfers it from Saint Vincent and the Grenadines;

for the purpose of assisting any person to avoid prosecution for a drug trafficking or relevant offence or the making or enforcement of a confiscation order."

Section 41(3)- *"In this section the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it."*

[48] Section 42 (1) of the PCMLA 2001 provides that: *"Subject to subsection (1), a person commits an offence if he enters into or is otherwise concerned in an arrangement whereby*

(a) the retention or control by or on behalf of another person ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) A's proceeds of criminal conduct

(i) are used to secure that funds are placed at the disposal at A's disposal; or

(ii) are used for A's benefit to acquire property

and he knows or suspects that A is a person who is or has been engaged in or has benefited from criminal conduct."

[49] Section 44(2) of the PCMLA provides that:- *"A person commits an offence if*

under Section 45; and Section 46 required financial institutions to maintain proper records and report suspicious transactions. SVG was removed from the FATF blacklist[50] because it was considered by the FATF to have done sufficient, legislatively and otherwise to be seen as a jurisdiction which cooperated internationally in the fight against money laundering. The 'so called' new offences will be examined to ascertain whether they represented a significant departure from the former PCA 1997.

Under the PCMLA 2001 money laundering was defined as doing any act:

> *(a) "which constitutes an offence under section 43, 44 or 45; or*
> *(b) which would constitute such an offence if done in St. Vincent and the Grenadines. and for these purposes, having possession of any property shall be taken to be doing an act in relation to it."*[51]

The definition of money laundering included the offences under sections 43, 44 and 45. If those were the only three offences that could be committed by doing an act which related to money laundering, what was the meaning of the second limb(b) in the definition of money laundering? Surely, the acts which would give rise to those three offences were expected to be carried out in SVG. Moreover, the first limb(a) by stating the offences which would result from the 'doing of any act' obviated the need to repeat that the doing of the act would constitute an offence if done in SVG. That being the case, the second limb appeared to be otiose and contributed nothing further to the definition of money laundering, except to emphasise that extraterritorial money laundering was included.

Although in the definition of money laundering no mention is made of Sections 41, 42 and 46 they are nonetheless listed under Part V of the PCMLA 2001 as money laundering offences. Accordingly, further analysis will be conducted of those offences to ascertain whether any substantial changes have been made to the former PCA 1997 or any relevant legislation that was in existence prior to the blacklisting of SVG.

(a) *he knows or suspects that another person is engaged in money laundering which relates to any proceeds of drug trafficking;*
(b) *the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment; and*
(c) *he does not disclose the information or other matter to a police officer as soon as is reasonably practicable after it comes to his attention."*

[50] FATF' 2003 Report- "Review to Identify Non-Cooperative Countries and Territories"-Executive Summary

[51] Section 2 of the PCMLA 2001

5.4 *Acquisition of Property derived from the Proceeds of Criminal Conduct*

Under Section 43(1) of the PCMLA 2001,[52] any person who knowingly acquires, possesses or uses property that is derived from the proceeds of the criminal conduct of another, commits an offence. The words 'acquires' and 'uses' are significant in determining whether the offence has actually been made out but the PCMLA 2001 has not provided a definition for those terms. The ordinary meaning of the term 'acquire' refers to *'gain by and for oneself;' 'obtain,'* or *'come into possession.'*[53] The Black's Law Dictionary provided further definitions which included, *'to gain possession or control of;' 'to get or obtain.'*[54] In SVG the Fire Arms Act 1996, defined 'acquire' to *'mean hire, accept as a gift or borrow.'*[55] In **Congreve v IRC**[56] Cohen J suggested that; *'As used by lawyers the word 'acquired' has long covered transactions of a purely passive nature and means little more than receiving...'*[57] If Cohen J's judgment were to be accepted then a person could acquire property by just receiving it and without having to engage in any positive action to achieve it.

A different perspective was given to the meaning of 'acquire' in **Re Fago Plumbing & Heating Supplies Ltd**[58] wherein 'acquire' was distinguished from 'accrual' in that 'acquire' contemplates some form of positive action on the part of the person acquiring the property. 'Accrual' on the other hand connotes inactivity on the part of the person to whom property is attributed. Essentially, there is required to be some sort of positive action flowing from the person acquiring the property. Support for this contention can be gleaned from the definition of possession under the PCMLA 2001 where it is provided that possession of property for the purposes of the PCMLA 2001 *'shall be taken to be doing an act in relation to it.'*[59] In essence the person must know that he was in possession of the property.[60] As Lord Scarman enunciated in the case of **R v Boyesen**,[61]

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[52] Section 43(1) of the PCMLA 2001 provides that: *"A person commits an offence if, knowing that any property is, in whole or in part directly or indirectly represents another person's proceeds of criminal conduct, he acquires or uses that property or has possession of it."*

[53] Oxford English Reference Dictionary, Revised 2nd Edition, 2002 at p 12

[54] Garner B., "Black's Law Dictionary," Abridged 7th Edition, 2000, at p 19

[55] Section 2

[56] [1947] 1 All ER 168

[57] Ibid at 178

[58] [1972] 1 OR 259 at 262, Ontario Supreme Court as per Houden J.

[59] Section 43(6) of the PCMLA 2001

[60] Warner v Metropolitan Police Comr [1968] 2 AC 256 at p 305 as per Lord Pearce *"I think that the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word 'possess...'*

'Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it.'[62]

But acquisition and possession are not the only treatment of the property that can result in the commission of the offence. The person who 'uses' the property may be held culpable as well. The term 'use' was defined as *'The application or employment of something; esp., a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional.'*[63] Both Malcolm CJ[64] and Pidgeon J[65] in the case of **R v Rintel**[66] adopted a definition for 'use' that is similar to the definition given above in Black's Law Dictionary. Essentially, a person does not necessarily have to be in physical possession or control of the property or even apply it for his benefit in order to be considered as having used it. Provided that the property has been applied or employed by that person, for whatever reason, with the knowledge that it was derived from criminal conduct, the offence would have been committed.

Therefore, any one who supplied goods and/or services and had collected property in return, could be deemed to have knowledge that it represented the proceeds of criminal conduct. The lawyer, doctor, accountant, green grocer, builders merchant, financial institution, retail outlet and a host of other commercial entities can all be caught by this offence. If, however, everyone investigated every customer, patient or client from whom property was received in order to ascertain the provenance of the property, there would be a serious disruption of the smooth processing of transactions. Moreover, it would impose a tremendous burden of unimaginable proportions and in the final analysis will be administratively unworkable. Accordingly, provisions were made to absolve from the offence those persons with plausible reasons for the acquisition, possession or usage of property which represented the proceeds of criminal conduct.

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[61] [1982] 2 All ER 161, House of Lords.
[62] Ibid at p. 163
[63] Garner Brian "Black's Law Dictionary," , 2000, at p 1249
[64] (1991) 52 A Crim R 209
[65] (1991) 52 A Crim R 209 at p 212
[66] (1991) 52 A Crim R 209

The law provides that, once a person acquires, uses or possesses the property for adequate consideration[67] then he has a defence to the charge of committing the offence.[68] Consideration refers to the price that was paid for goods or services. The price in this context is not restricted to mere cash it could also be the provision of contractual services or an exchange of goods.[69]If however the goods or services[70] provided have assisted any one in the furtherance of criminal conduct, those goods or services would not be accepted as consideration for the purposes of the offence.[71] The defence appears to be rather bizarre. It seems to suggest that a person with knowledge that a property represents the proceeds of crime could nonetheless acquire that property and escape criminal liability if the consideration that was given for the property is adequate. Graham, Bell and Elliot suggested that the defence essentially covered those who 'supply ordinary goods and services' because they are not under any obligation to question the provenance of the funds that they received in return.[72]

That suggestion was only accurate to the extent that; ***(a)*** the criminal conduct from which the property was derived could be attributed to a relevant offence[73] as opposed to a drug trafficking offence[74] and; ***(b)*** the business of supplying goods and services could

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[67] Section 43(3) of the PCMLA 2001 provides that: *"For the purposes of subsection (2) –*
   (a) a person does not acquire property for adequate consideration if the value of the consideration is significantly less than the value of the property; and
   (b) a person does not use or have possession of the property for adequate consideration if the value of the consideration is significantly less than the value of his use or possession."

[68] *Section 43(2) of the PCMLA 2001 provides that; " Subject to subsection (4) it is a defence to a charge of committing an offence under this section that the person charged acquired or used the property or had possession of it for adequate consideration."*

[69]Morris- Cotterill, N., "How not to be a Money Launderer-The avoidance of fraud and money laundering in your organisation" Silkscreen Publications, 2nd edition, 1999, at p 89.

[70]Rees E., & Hall A., "Blackstone's Guide to The Proceeds of Crime Act 2002," Oxford University Press, 2003, at p 105 where it is stated that; "*...a supplier of a getaway car to be used in a robbery, who is paid from the proceeds of an earlier robbery, will not be availed by an argument that the vehicle was sold at, or possibly above, the market price."*

[71] Section 43(4) of the PCMLA 2001 provides that: *"The provision for any person of services or goods which are of assistance to him in criminal conduct shall not be treated as consideration for the purposes of subsection (2)"*

[72] Graham T., Bell E., & Elliot N., 'Money Laundering,' Butterworths, 2003, at p 47

[73] Section 2 of the PCMLA 2001 defines 'relevant offence' as:
"(a) any indictable offence or an offence triable both summarily or on indictment in Saint Vincent and the Grenadines from which a person has benefited as defined in section 7(3) of this Act, other than a drug trafficking offence;
(b) any offence listed in Schedule 2 to this Act;
(c) any act or omission which, had it occurred in Saint Vincent and the Grenadines, would have constituted an offence as defined in paragraph (a) or paragraph (b);"

[74] Section 2 of the Proceeds of Crime Money Laundering Act 2001 defines drug trafficking offence as;
   "(a) an offence as defined in the Drug Trafficking Offences Act;
   (b) under the sections 41, 42 or 43 of this Act which relates to the proceeds of drug trafficking; or an offence under the Criminal Code constituting an attempt, incitement or conspiracy to commit a drug trafficking offence;"

not be classified as a financial institution or relevant business activity.[75] If the criminal conduct constitutes a drug trafficking offence it appears that those who supply goods and services will be under a duty to disclose their knowledge or suspicion about the provenance of the property to a police officer (see below).[76] Any failure to make such a disclosure constitutes an offence.[77] It is also noteworthy that where the business activity can be classified as a financial institution or relevant business activity as itemised under Schedule 1 of the PCMLA 2001, an obligation to report any suspicious transaction is imposed upon that business by Section 46(3) of the PCMLA 2001.[78]

Therefore, lawyers, accountants and financial intermediaries, due to the fact that they are listed as relevant business activities, would run the risk of being caught by this section. It is however very interesting to see how the law enforcement officials will deal with the situation where a lawyer received legal fees from a drug trafficker for services rendered in his defence. The effect of the defence is that a person who for adequate consideration knowingly acquired, used or possessed property which represented the proceeds of drug trafficking would not be committing a section 43(1) offence. However, that person may be committing the offence of failure to disclose his knowledge or suspicion to a police officer under Section 44(2). If however the property did not represent the proceeds of drug trafficking and the business in which he was engaged could not be classified as a financial institution or relevant business activity then he would be completely absolved from Section 43(1) and 44(2) offences.

It would appear that a person not being classified as a financial institution or a relevant business activity will be given more latitude to transact with persons that are engaged in criminal conduct. Rees and Hall have justified the latitude given to those persons by suggesting that; *'in order to protect those such as retailers who may be paid for ordinary consumer goods with funds they are suspicious of, the provision only bites where persons acquired or used or had possession of the property for less than adequate consideration.'*[79]

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[75] See Schedule 1 of the PCMLA 2001 for entities that are listed as financial institutions and relevant business activities.
[76] Section 44(2)(a) of the PCMLA 2001
[77] Section 44(2)(c) of the PCMLA 2001
[78] Section 46(3) of the PCMLA 2001 provides as follows: *"Upon suspicion that the transactions described in subsection (2) could constitute or be related to money laundering or the proceeds of criminal conduct, a financial institution or person engaged in a relevant business activity shall report the suspicious transactions to the Financial Intelligence Unit in a form specified in the Regulations, as soon as reasonably practicable, and in any event, within fourteen days of the date the transaction was deemed to be suspicious as relating to money laundering or the proceeds of criminal conduct."*
[79] Rees E., & Hall A., "Blackstone's Guide to The Proceeds of Crime Act 2002," 2003, at p 105

Therefore, persons not being financial institutions or engaged in relevant business activities who are charged with a section 43(1) offence and who have provided adequate consideration for the property will be encouraged to contend that their knowledge only extend to criminal conduct as it related to a relevant offence and not as it related to drug trafficking. Such a representation is likely to absolve them from any criminal liability and diminishes the possibility of law enforcement officials procuring a conviction under this section.

A further defence to the charge was provided to a person who was caught under section 43(1). Such a person must however prove; ***(a)*** that he intended to inform the police of his belief that the property represented the proceeds of crime that arose out of another person's criminal conduct and; ***(b)*** that he had a reasonable excuse why he was unable to make such a disclosure to a police officer prior to dealing with the property.[80] By disclosure the person was required to state[81] or inform or communicate[82] to the police officer his suspicion or belief that another person was engaged in drug money laundering. It was however advisable that the person making the disclosure did so in writing since he may subsequently need to adduce the evidence to show that he did make a disclosure. In the light of the fact that it was quite possible that he may be reporting what the police officer already knew the court may favourably consider the fact that he made the disclosure and disregard the prior knowledge of the police officer as irrelevant to ascertaining whether a defence had been made out.[83] Information was not defined in the PCMLA but may be understood to relate to any data requested

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[80] Section 43(7) of the PCMLA 2001 provides that: *"In proceedings against a person for an offence under this section, it is a defence to prove that*

(a) he intended to disclose to a police officer such a belief or matter as is mentioned in subsection (5), but

(b) there is reasonable excuse for this failure to make any such disclosure in the manner mentioned in subsection(5)(b)."

Section 43(5) of the PCMLA 2001 provides, "Where a person discloses in good faith to a police office a belief that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, or any matter on which such a belief is based

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise and shall not give rise to any criminal, civil or administrative liability; and

(b) if he does any act in relation to the property in contravention of subsection (1), he does not commit an offence under this section if

(i) the disclosure is made before he does the act in question and the act is done with the consent of the police officer; or

(ii) *the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it."*

[81] Warrington v Leake (1835) 11 Exch 304 at p 307 as per Pollock CB

[82] Federal Comr of Taxation v Westgarth (1950) 81 CLR 396 at 407 as per Latham CJ

[83] Ibid

verbally or otherwise. This may include any knowledge no matter how it was acquired.[84]

It was suggested by Morris-Cotterill that this offence was introduced to ostracise those who engage in criminal conduct from law abiding citizens.[85] Therefore, spouses, parents, relatives and friends were the persons who should thread cautiously since they were more likely to benefit from the proceeds of another person's criminal conduct. If any of those persons was given a house, a car, jewellery, clothes or any other property or used or possessed any of those items in the knowledge that they represented the proceeds of criminal conduct, he may well be committing the offence unless he could successfully avail himself of one of the defences.

5.5 *Reporting Knowledge or Suspicion of Drug Trafficking*

Section 44(2) imposes a legal obligation on every person involved in a trade, profession, business or employment to disclose to a police officer any information obtained in the course of his trade, profession, business or employment which led to his knowledge or aroused his suspicion that another person is engaged in laundering the proceeds of drug trafficking.[86] Any person who fails to disclose knowledge or suspicion of drug money laundering activity to a police officer as soon as reasonably practicable after he acquired that knowledge or formed that suspicion is committing an offence. It was however suggested that a person who obtained the information other than in the course of his job (e.g. at a social or sporting event) would not be committing the offence if he failed to disclose information to a police officer.[87] A person may be held to have committed the offence if the prosecution proves beyond reasonable doubt that he knew or suspected that another person was engaged in drug money laundering.

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[84] Re Stewart and Olivant and Seadons Contract [1896] 2 Ch 328 CA

[85] Morris- Cotterill N., "How not to be a Money Launderer-The avoidance of fraud and money laundering in your organisation", 1999, at p 89.

[86] Section 44(2) of the PCMLA 2001 provides that: *"A person commits an offence if*

- *(a) he knows or suspects that another person is engaged in money laundering which relates to any proceeds of drug trafficking;*
- *(b) the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment; and*
- (c) *he does not disclose the information or other matter to a police officer as soon as is reasonably practicable after it comes to his attention."*

[87] Howard C., "Butterworths Money Laundering Law" 2001, at p 3/582, para 792

The obligation to report is not however imposed on a professional legal adviser who came by the information in privileged circumstances[88] but an obligation will however be imposed where the information was received or given for the purpose of furthering criminal conduct.[89] Section 44(4)[90] makes provision for a defence to the charge if there was a reasonable excuse for failing to disclose the information to a police officer. The accused will therefore be required to prove on a balance of probabilities[91] that he had a reasonable excuse for failing to disclose the information. The law appears to have attributed greater stigma to the offence of drug trafficking than to any of the relevant offences. At a time when organised criminal activity has infiltrated a wide variety of legitimate and illicit activities to attribute a lesser stigma to relevant offences seems untenable.

5.6 *Tipping Off*

The offence of tipping off is provided under Sections 45(1) and (2). Under Section 45(1) the offence is committed when a person knows or suspects that a police officer is about to start or has started a money laundering investigation but has nonetheless made a disclosure to another person which is likely to prejudice the investigation.[92] This

[88] Section 44(3) of the PCMLA 2001 provides that: *"Subsection (2) does not make it an offence for a professional legal adviser to fail to disclose any information or other matter which has come to him in privileged circumstances."*

[89] Section 44(6) of the PCMLA 2001 provides that: *"For the purposes of this section, any information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him*

- *(a) by, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client;*
- *(b) by, or by a representative of, a person seeking legal advice from the adviser; or*
- *(c) by any person –*
    - *(i) in contemplation of, or in connection with, legal proceedings; and*
    - *(ii) for the purpose of those proceedings;*

but no information or other matter shall be treated as coming to a professional legal adviser in privileged circumstances if it is communicated or given with a view to furthering a criminal purpose."

[90] Section 44(4) of the PCMLA 2001 provides that: *"It is a defence to a charge of committing an offence under this section that the person charged had a reasonable excuse for not disclosing the information or other matter in question."*

[91] Section 63 PCMLA 2001

[92] Section 45(1) of the PCMLA 2001 provides that: *"A person commits an offence if*

- *(a) he knows or suspects that a police officer is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering or the proceeds of criminal conduct; and*
- (b) *he discloses to any other person information or any matter which is likely to prejudice that investigation or proposed investigation."*

Section 45(2) of the PCMLA 2001 provides that: *"A person commits an offence if*

- *(a) he knows or suspects that a disclosure has been made to a police officer or to an appropriate person under section 41, 42 or 43; or*
- *(b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following such a disclosure."*

restriction does not however apply to a professional legal adviser when he is providing legal advice to his client or to any other person in contemplation of legal proceedings. It nonetheless, covers any information that is disclosed to a professional legal adviser for the purpose of furthering criminal conduct.[93] The disclosure to which the section refers appears to be restricted only to money laundering. This means that it will be an offence to tip off the burglar's launderer that he is being investigated for money laundering but it will not be an offence to tip off an accessory to burglary that he is being investigated for the burglary.[94]

Any person who is charged with the offence of tipping off will be entitled to a defence if he can prove on the balance of probabilities[95] that he did not know or suspect that the disclosure was likely to be prejudicial in 'the way therein mentioned.'[96] It is not clear what the phrase 'likely to be prejudicial' actually means, although two Australian cases[97] have tried to clarify the word 'likely' to no avail. The lack of clarity of the word 'likely' may present some difficulties for the accused especially if the prosecution adduce evidence to demonstrate the prejudicial impact of the disclosure on the investigation.

The offence of Tipping off which was created under Section 45(2) is very badly drafted. It provides as follows:

> *"A person commits an offence if*
>
> > *(a) he knows or suspects that a disclosure has been made to a police officer or to an appropriate person under section 41, 42 or 43; or*
> > *(b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following such a disclosure."*

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[93] *Section 45(3) of the PCMLA 2001 provides "Nothing in subsection (1) or (2) makes it an offence for a professional legal adviser to disclose any information or other matter*

(a) to, or to a representative of, a client of his in connection with the giving by the adviser of a legal advice to the client; or

(b) to any person

(i) in contemplation of, or in connection with legal proceedings; and

(ii) for the purpose of those proceedings;

but this subsection does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose."

[94] Howard C., "Butterworths Money Laundering Law" 2001, at p 3/444, para 621

[95] Section 63 of the PCMLA 2001

[96] Section 45(4) of the PCMLA 2001 provides that: *"In proceedings against a person for an offence under section (1) or (2), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way there mentioned."*

[97] Australian Telecommunications Commission v Kreg Enterprises Pty Ltd (1976) 27 FLR 400 where it was held that 'likely' is synonymous with 'possible' so that there is an odds-on chance of the thing happening: See also Broughey v R (1986) 65 ALR 609 at 611, as per Gibbs J where it was held that 'likely' means 'probable' and not 'possible.'

There are four obvious defects with that provision. Firstly, under section 41 no provision is made for the disclosure of information and therefore the inclusion of section 41 under the first limb is otiose. Secondly, the only person to whom a disclosure is required to be made pursuant to sections 43 and 44 is a police officer. The inclusion of the words 'to an appropriate person' is tautologous and therefore unnecessary. Thirdly, the first and second limbs are separate and distinct offences. Under the first limb it is an offence to know or suspect that a disclosure was made to a police officer. In effect a person with the requisite knowledge or suspicion is committing an offence for possessing such knowledge or forming such a suspicion. That offence is nonsensical and could not have been the intention of Parliament. Moreover, it is an offence to disclose to any other person information or any other matter which is likely to prejudice an investigation which might be conducted following a disclosure. The second limb creates an offence of strict liability. There is no requirement that the person making the disclosure should know, suspect or believe that it is likely to prejudice an investigation or proposed investigation.

The consequences of section 45(2) can be grave since knowledge or suspicion of and even innocent utterances about any matter that may prejudice an investigation can result in the commission of an offence. Moreover, the defence that is available to the accused provides little help where he is required to prove on a balance of probabilities *"that he did not know or suspect that the disclosure was likely to be prejudicial in the way therein mentioned."*[98] This is so mainly because the mental elements of knowledge and suspicion are not required for the commission of an offence under section 45(2)(b). Moreover, under section 45(2)(a) anyone who has the knowledge or formed a suspicion that a disclosure was made to a police officer has committed an offence. Such a person cannot benefit from the defence under section 45(4) which solely relates to the disclosure of information which is prejudicial to an investigation. Bearing in mind that the accused appears to have little or no recourse to redress against those responsible for any injustices that he may have suffered[99] every effort should be made by the government of SVG to amend section 45(2). Essentially, section 45(2) will be more

[98] Section 45(4) of the PCMLA Act 2001

[99] Section 45(5) of the PCMLA 2001 provides that: *"No police officer or other person commits an offence under this section in respect of anything done by him in the course of acting in accordance with the enforcement, or intended enforcement, of any provision of this Act or of any other statutory provision relating to criminal conduct or the proceeds of criminal conduct."*

meaningful if it provided an offence for the disclosure of information by any person to another, the knowledge or belief that a disclosure was made to a police officer under sections 42 and 43 and as a result of making the disclosure the conduct of any investigation is likely to be prejudiced.

5.7 *Concealing or Disguising the Proceeds of Criminal Conduct*

Sections 41(1) [100] and (2)[101] have criminalised the concealment,[102] disguise, conversion[103] or transference[104] of property or removal from SVG of property that represents the proceeds of criminal conduct, provided that it was done for the purpose of avoiding a prosecution for a drug trafficking or relevant offence or the making of a confiscation order. This offence relates to the person who owns or possesses[105] the proceeds of criminal conduct as well as to any one who knows or entertains a reasonable ground to suspect that any property represents the proceeds of criminal conduct but nonetheless assisted[106] the owner of the property to avoid prosecution or a confiscation order.

Pursuant to Section 41(1) the prosecution will be required to prove that a particular predicate offence has been committed if it is to be successful. For example, if the

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[100] Section 41(1) of the PCMLA 2001 provides that: *"A person commits an offence if he*

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct, or
(b) converts or transfers that property, brings it into or removes it from Saint Vincent and the Grenadines;

for the purpose of avoiding prosecution for a drug trafficking or relevant offence or the making or enforcement of in his case a confiscation order."

[101] *Section 41(2) of the PCMLA 2001 provides "A person commits an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he*

(c) conceals or disguises that property, or
(d) converts or transfers that property, brings it into or removes it from Saint Vincent and the Grenadines;

for the purpose of assisting any person to avoid prosecution for a drug trafficking or relevant offence or the making or enforcement of in his case a confiscation order."

[102] London Assurance v Mansel (1879) 11 Ch D 363 at 363 as per Jessel MR where it was mentioned that concealment also refers to a failure to communicate; See also Glicksman v Lancashire & General Assurance Co Ltd. [1927] AC 139, where concealment involved the application of measures designed to prevent others from acquiring knowledge or making certain observations.

[103] Stack v Church Comrs [1952] 1 All ER 1352, CA where conversion was taken to mean change: See also Wilkinson v Rogers (1863) 12 WR 119 where conversion was referred to the alteration of form and structure. But in Re Evans Hewitt v Edwards [1940] Ch 629, conversion must be conscious and deliberate

[104] Lyle & Scott Ltd v Scotts Trustees [1959] 2 All ER 661 at 668 where Lord Reid stated that transfer essentially means, *"to hand over or part with something...with the context determining in what sense the word is used"'*

[105] Section 41(1) of the PCMLA 2001

[106] Section 41(2) of the PCMLA 2001

underlying ('predicate') offence is drug trafficking, the prosecution needs to firstly establish that the accused had committed that offence before any successful prosecution can be brought against the accused for laundering the proceeds of drug trafficking. The section is not only concerned with the cash that is obtained from criminal conduct, it is also concerned with other properties that have been acquired with the proceeds of criminal conduct. Once it is established that a drug trafficking or relevant offence has been committed, the prosecution only need to show that the property was acquired with the proceeds of those offences to complete the offence. Accordingly, the drug dealer who receives say $200,000 from his involvement in drugs and uses that money to acquire a property costing $450,000 may well find that the property becomes the subject of attack.[107] It does not matter whether someone else' money was also used to acquire the property, once it is established that the property that is concealed or disguised represents in whole or in part, directly or indirectly the proceeds of criminal conduct an offence has been committed. Finally, the prosecution will be required to prove that there was an 'intent'[108] to avoid the prosecution for a criminal offence or the making of a confiscation order if it is to succeed.

Section 41(2) creates an anomaly, in that a person can be convicted of the offence although no predicate offence has been committed. The prosecution is only required to prove that the person knew or had reasonable grounds to suspect that the property in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct. The prosecution does not necessarily have to prove that a subject offence was committed. Provided that the court feels that the information to which the accused was privy was sufficient to arouse suspicion in a reasonable person (see below at 5.11) that the property in question represents the proceeds of crime, the accused will be convicted. Accordingly, a person can be convicted for believing that he is laundering the proceeds of crime even though the property being laundered may not have been unlawfully obtained. The question that falls to be answered is if the purpose for the money laundering legislation is to take the profits out of crime then this presumes that the profit directly or indirectly relates to criminal conduct, if there is no criminal conduct should a person be convicted for a money laundering offence?

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[107] Morris- Cotterill N., "How not to be a Money Launderer-The avoidance of fraud and money laundering in your organisation", 1999, at p 82

[108] McCormack G., 'Money Laundering and Banking Secrecy' The Company Lawyer, vol. 16 No. 1, pp 6-10 at p 8: See also Howard C., "Butterworths Money Laundering Law" 2001, at p 3/335, para 552.

5.8 *Arranging to Retain, Control and Use the Proceeds of Criminal Conduct*

Section 42(1)[109] on the other hand criminalises any situation whereby a person knowing or suspecting that another person has engaged in and/or benefited from criminal conduct has nonetheless made arrangements[110] for that other person to continue benefiting from the proceeds of criminal conduct.[111] Under this offence the prosecution is required to prove beyond reasonable doubt that the accused knew or suspected that the other person is engaged in, 'has been engaged in or has benefited from criminal conduct.' Any person who provided such assistance is entitled to a defence under section 42(3), if he; ***(a)*** formed a suspicion or belief that the arrangement involved or was connected with the proceeds of criminal conduct and he informed and obtained the permission of a police officer prior to his involvement in the arrangement or; ***(b)*** if after he became involved in the arrangement he made the disclosure on his own volition *'as soon as it is reasonable for him to make it.'*[112] Section 42(4)[113] also provides a defence to the

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[109] Section 42(1) of the PCMLA 2001 provides that: *"Subject to subsection (3), a person commits an offence if he enters into or otherwise concerned in an arrangement whereby*

(a) the retention or control by or on behalf of another person ('A') of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) A's proceeds of criminal conduct
(i) are used to secure that funds are placed at A's disposal; or
(ii) are used for A's benefit to acquire property

and he knows or suspects that A is a person who is or has been engaged in or has benefited from criminal conduct."

[110] Manning v Eastern Counties Rly Co (1843) 13 LJ EX 265 where it was held that arrangement *'is a very wide and indefinite one'*. But see Re British Basic Slag Ltd's Agreements [1963] 2 All ER 807 at p 814 CA where Wilmer LJ in describing arrangement stated: *"Where each of the two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An 'arrangement' is therefore something whereby the parties to it accept mutual rights and obligations.' Accordingly, an arrangement connotes the meeting of minds and therefore does not exist in the absence of communication and expectations. A mere assistance does not amount to an arrangement."*

[111] Essentially this offence seeks to prohibit others from assisting the criminal to acquire property by way of investments, to buy shares, to take out insurance policies, to use other person's bank accounts etc. It also prohibits the banker who is aware that a person is involved in criminal activity from doing business with such a person.

[112] Section 42(3) of the PCMLA 2001 provides that; *"Where a person discloses in good faith to a police officer a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct, or any matter on which such a suspicion or belief is based;*

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise and shall not give rise to any civil liability; and

(b) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if
(i) the disclosure is made before he does the act concerned and the act is done with the consent of a police officer; or
(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it."

[113] Section 42(4) of the PCMLA 2001 provides *"In proceedings against a person for an offence under this section, it is a defence to prove*

accused if he can prove; ***(a)*** that he did not know or suspect that the arrangement related to another person's proceeds of criminal conduct;***(b)*** that he did not know or suspect that his assistance facilitated the laundering of the proceeds of crime; or ***(c)*** that he intended to disclose[114] to a police officer his suspicion or belief that the funds or investments represented the proceeds of criminal conduct; but ***(d)*** that his reason for failing to disclose is reasonably excusable in the circumstances.

5.9 *Reporting Suspicious Transactions*

Section 46(1) requires every financial institution[115] or person that is engaged in relevant business activity[116] to pay special attention to large, unusual and even insignificant but periodic transactions.[117] If any of those transactions raises a suspicion that it is connected to or in some way involved in money laundering activity, a report should be made to the Financial Intelligence Unit (FIU).[118] Any financial institution or person

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(a) *that he did not know or suspect that the arrangement related to any person's proceeds , of criminal conduct;*
(b) *that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1)(b); or*
(c) *that*
    (i) *he intended to disclose to a police officer such a suspicion, belief or matter as is mentioned in subsection (3) in relation to arrangement, but*
    (ii) *there is reasonable excuse for his failure to make any such disclosure in the manner mentioned in subsection (3)(b)"*

[114] Section 42(3) of the PCMLA 2001 provides *"Where a person discloses in good faith to a police officer a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct, or any matter on which such a suspicion or belief is based*
(a) *the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise and shall not give rise to any civil liability; and*
(b) *if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if*
    (i) *the disclosure is made before he does the act concerned and the act is done with the consent of a police officer; or*
    (ii) *the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it."*

[115] Financial Institutions are itemised in Schedule 2 to the PCMLA 2001 and include among other institutions offshore entities such as, a Mutual Fund, an International Bank, an International Trust, an International Insurance and a Registered Agent and Trustee.

[116] Relevant Business Activity is also itemised under Schedule 2 of the PCMLA 2001 and includes amongst quite a number of other institutions, trust and fiduciaries services, Investment Business, Barristers-at-Law, Solicitors and Accountants.

[117] Section 46(2) of the PCMLA 2001 provides that: *"Every financial institution or person in a relevant business activity shall pay special attention to all complex, unusual or large transactions, whether completed or not, and to all unusual patterns of transactions, and to insignificant but periodic patterns of transactions, which have no apparent lawful purpose."*

[118] Section 46(3) of the PCMLA 2001 provides that: *"Upon suspicion that the transactions described in subsection (2) could constitute or be related to money laundering or the proceeds of criminal conduct, a financial institution or person engaged in a relevant business activity shall report, the suspicious transactions to the Financial Intelligence Unit in a form specified in the Regulations, as soon as reasonably practicable, and in any event, within fourteen days of the date the transaction was deemed to be suspicious as relating to money laundering or the proceeds of criminal conduct."*

engaged in relevant business activity who fails to disclose a suspicion that a transaction may well have been connected or associated with money laundering activity has committed an offence.[119] To facilitate the diligent scrutiny of transactions that are processed on a daily basis and to ensure that suspicious transactions are spotted, noted and reported, every financial institution or person engaged in relevant business activity has a legal obligation to institute a written compliance programme to monitor whether the institution is in compliance with the Proceeds of Crime (Money Laundering) Regulations ('PCMLR') 2001.[120]

5.10 *Proceeds of Crime (Money Laundering) Regulations ('PCMLR') 2001*

The PCMLR 2001 became effective on 22nd January, 2002. It emphasises the need for a regulated institution[121] to know its customers and anyone with whom it proposes to engage in a commercial relationship.[122] The PCMLR 2001 imposes on regulated institutions responsibilities to maintain proper records[123] for varying periods of time depending on the type of record being kept.[124] It also requires regulated institutions to implement customer identification systems and reporting mechanisms without regard to the size of the regulated institution. This seems very ambitious considering that apart from banks and other financial institutions most of the other regulated activities are conducted by professionals such as lawyers and accountants.[125] All of those professionals have a very small complement of staff, in most cases only one secretary

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[119] Section 46(4) of the PCMLA 2001 provides that: *"Failure to report a suspicious transaction as required by subsection (3) is an offence."*

[120] Section 46(6) of the PCMLA 2001 provides that: *"Every financial institution or person engaged in a relevant business activity shall develop and implement a written compliance programme reasonably designed to ensure and monitor compliance with Regulations made under this Act."*

[121] Regulation 2(2) of the PCMLR 2001 provides that: *"Regulated Institution "means a financial institution and regulated business activity as stated in Schedule 1 of the Proceeds of Crime and Money Laundering (Prevention) Act 2001 and includes a trust settlement."*

[122] Regulation 4

[123] Regulation 5

[124] Regulation 4(4) provides as follows: *"For the purposes of this regulation, the minimum retention period in relation to a record held by a regulated institution is*

> *(a) if the record relates to the opening of an account with the institution, the period of seven years after the day on which the account is closed;*
> *(b) if the record relates to the renting by a person of a safety box held by the institution, the period of seven years after the day on which the deposit box ceases to be used by the person; or*
> *(c) in any other case, the period of seven years after the day on which the transaction recorded takes place.*

But in any case where the Financial intelligence Unit has notified a regulated institution in writing that particular records are or may be relevant to an investigation that is being carried out, records shall be retained pending the outcome of the investigation."

[125] Information from discussion with OFA and Chamber of Industry and Commerce in 2000.

and an office attendant. To expect the majority of regulated institutions to implement training programmes and establish reporting mechanisms is very ambitious but lawful.

The PCMLR 2001 is not drafted for the majority of regulated institutions. It appears to be the ideal guidelines for the commercial sector of developed countries with sophisticated financial centres but makes no provision for the size and nature of the operations of its local enterprises. For example, it is doubtful whether the majority of those professionals establish a business relationship with an overseas client more than twice a year at best. SVG does not have a vibrant financial services sector and there is very little if any foreign investment being conducted in the domestic financial services sector where most of the professionals ply their trade.[126] It is worrying that notwithstanding the paucity of business activity and the small size of the staff, harsh penalties[127] are imposed upon those who do not comply with the PCMLR 2001. It is very likely that the harshness of the penalties and the dearth of business opportunities may significantly reduce any attraction to participate in any business activity in SVG.[128] The new money laundering legislative regime appears to frustrate commercial activity as opposed to furthering and developing it.[129] Such is the result of the FATF/OECD's initiative.

5.11 *Knowledge and Reasonable grounds to Suspect as Mens Rea elements*

In the previous chapter[130] 'suspicion' and 'belief' were discussed and therefore will require no further elaboration in this chapter. In the light of the fact that the principal money laundering offences have 'knowledge' as one of the *mens rea* elements, the concept of 'knowledge' will therefore be further examined. Knowledge under section 43(1) is 'knowing.' This requires the existence of the *mens rea* for all the elements of the offence.[131] In determining what constitutes knowledge the courts in **R v Harris**[132] and

[126] Mitchell L., "A World of Opportunities," The Searchlight Newspaper, vol. 9 No. 40 Friday 3rd October, 2003 at p 26
[127] Regulation 9 of the PCMLR 2001 provides penalties of ten thousand dollars for summary conviction and a maximum of one million dollars and/or three years imprisonment for a conviction on indictment.
[128] Information received from the Offshore Finance Authority shows that several offshore entities including banks, trust, IBCs and even Registered Agents have been surrendering their licenses.
[129] The drastic reduction in the offshore registrations bears ample testimony to fact that the new regulatory and supervisory regime is not seen as desirable by many investors.
[130] See chapter 4.7
[131] Wings Ltd v Ellis [1984] 3 All ER 577, House of Lords
[132] [1987] 84 Cr App Rep. 75

in the earlier cases of **R v Grange**[133] and **R v Griffiths**[134] have all suggested that 'knowledge' is a word to be applied by the tribunal of fact and it required no further embellishment. But even with that suggestion knowledge may still be somewhat difficult to establish. Unless there is direct evidence[135] which would create absolute certainty about the provenance of the property it may be difficult for the person to know and the prosecution to prove that he had knowledge that the property was a derivative of criminal conduct or that the person that he assisted actually benefited from criminal conduct. But Simester and Sullivan suggested that, *"It is generally impossible to know anything with utter certainty: even the evidence of one's own eyes may occasionally be doubted."*[136]

Recognising the likely problems[137] that the mens rea of knowing can create in procuring a conviction, the 1988 Vienna Convention suggested a more expansive approach to ascertaining whether a person had the requisite knowledge for the offence. In that regard it provided that; *'Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.'*[138] The wording of Article 1 of the 1991 EC Directive[139] is *pari materia* with that of the Vienna Convention. This is a clear indication from the international community that knowledge should not be confined to actual knowledge but may also be inferred from evidence of the surrounding circumstances.[140] This approach offers law enforcement officials an improved chance to procure convictions. In this way greater emphasis will be given to the evidence that was available to the accused at the time of his alleged involvement in the money laundering process. It is this evidence that the jury may examine to infer whether he possessed the requisite knowledge. In **The Zamora**[141] Lord Summer articulated the circumstances under which a person may be deemed to have knowledge. He stated that:

> *"There are two senses in which a man is said to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject of anything at all is then a wilful but a real ignorance. On the other hand, a man*

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[133] [1974] 1 All ER 928 (CA)
[134] (1975) 60 Cr App Rep 14 CA
[135] Smith J., "Criminal Law," Butterworths, 10th edn, 2002 at p 665
[136] Simester A., & Sullivan G.R, "Criminal Law theory and doctrine," Hart, 2000 at p 487
[137] Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2000] 4 All ER 22 CA
[138] Article 3 para 3
[139] Article 1, 91/308/EEC; *"...knowledge, intent or purpose required as an element... may be inferred from objective factual circumstances."*
[140] Simester A., & Sullivan G.R., "Criminal Law theory and doctrine," 2000 at p 137
[141] [1921] 1 AC 801

> *is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance...is a mere affectation and disguise."*[142]

Essentially, Lord Summer's statement falls within the doctrine of wilful blindness. This is where a person refrains from making enquiries into the provenance of the property because he is almost certain that it was derived from criminal conduct.[143] Simester and Sullivan suggested that the doctrine of wilful blindness is also applicable to the situation where *'the means of knowledge are easily to hand, and D realises the likely truth of the matter but refrains from enquiry in order not to know.'*[144] The doctrine of wilful blindness does not however, extend to cover every situation where a person deliberately refuses to satisfy his suspicions by conducting further enquiries.[145] If however it is successfully applied, the defendant will be deemed to have actual knowledge of the provenance of the property. There is indeed very little difference, if any in the current application of the doctrine of wilful blindness in ascertaining knowledge and the interpretation of knowledge that was suggested in Article 3 of the 1988 Vienna Convention and Article 1 of the 1991 EC Directive.

In the offences where the *mens rea* requires both knowledge and suspicion Graham, Bell and Elliot argued that the inclusion of knowledge in the principal money laundering offences is academic. They provide two reasons in support of their argument with which this thesis concurs.

> *"First, the mental element for each of the principal money laundering offences includes the element of suspicion, a lesser concept than knowledge. Secondly, the [PCMLA 2001] has introduced an objective mental element of reasonable grounds for suspicion, again a lower concept than knowledge. It is these two concepts which may be of practical importance (emphasis added)."*[146]

Reasonable grounds for suspicion, which is another *mens rea* element for the offence of concealing or disguising the proceeds of crime in order to avoid prosecution or the making of a confiscation order under section 41(2) of the PCMLA 2001, introduces an objective test in determining guilt. Essentially, if a 'reasonable person' being placed in the position of the accused would have suspected that the property in question

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[142] [1921] 1 AC 801 at p 812
[143] Westminster CC v Croyalgrange Ltd [1986] 2 All ER 353, at p 359
[144] Simester A., & Sullivan G., "Criminal Law theory and doctrine," Hart, 2000 at p 137
[145] Griffiths (1975) 60 Cr App Rep 14 CA
[146] Graham T., Bell E., & Elliot N., "Money Laundering," 2003, at p 38

represented the proceeds of another person's criminal conduct, the accused may well be taken to have formed such a suspicion and may be convicted accordingly. Therefore, under section 41(2) of the PCMLA 2001 a person can be convicted of an offence on the basis of the suspicion of a 'reasonable man' as opposed to his own state of mind.

5.12 *The 1979 Constitution and the PCMLA 2001*

In its continued efforts to be removed from the FATF's blacklist SVG appeared to have gone too far legislatively in certain aspects of its anti-money laundering provisions. Such a desire to demonstrate to the FATF that everything was done legislative and otherwise did not only adversely affect the OFSS but it also exposed certain offences under the PCMLA to challenges under the 1979 Constitution. In essence, such exposure dilutes the strength of the PCMLA 2001 and fortifies the argument against the repeal of the PCA 1997.

5.12.1 *Section 63 and the defence provisions*

The wording of Section 63 of the PCMLA is mainly responsible for the aforesaid exposure. It provides that;

> *"Any question of fact to be decided by a court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on the balance of probabilities."*

Essentially, the section requires that a person who is accused of a money laundering offence must adduce evidence which will prove on a balance of probabilities the facts on which he relies for his defence. In Woolmington v D.P.P[147] it was held that; *"Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."*[148] The prosecution is therefore generally required to prove every element of the offence and to do so beyond reasonable doubt. This position appears to be restated by section 63. However, by requiring the accused to adduce evidence which will prove on the balance of probabilities the facts on which he relies for a defence, section 63 has essentially introduced a statutory exception to the presumption of innocence where previously there was only an established

[147] [1935] AC 462
[148] Ibid at p. 481

common law exception[149] in existence. In that regard Emmerson and Ashworth pointed out:

> *"In general, when a common law defence is in issue, the defendant bears no more than an evidential burden to raise the defence, and then the prosecution must disprove the defence beyond reasonable doubt. The imposition of a purely evidential burden does not infringe the presumption of innocence...But if insanity is the defence, the accused must go further than discharging an evidential burden, and must prove on a balance of probabilities that he or she comes within the M'Naughten rules."*[150]

In so far as a statutory reversal of the burden of proof is concerned Emmerson and Ashworth also suggested that:

> *"...a statute which imposed a persuasive burden, requiring the accused to prove, on a balance of probabilities a fact which is essential to his guilt or innocence, required further examination. The court should determine whether the legislative technique which had been adopted was mandatory or discretionary, and whether it related to an essential element of the offence, or merely to an exemption or proviso. A mandatory presumption of guilt on an important essential element of an offence would be inconsistent with the presumption of innocence."*[151]

On the basis of the aforesaid, section 63 does not require the accused just to raise the defence but to adduce sufficient evidence to prove on a balance of probabilities the facts on which he intends to rely for his defence. In effect, section 63 has reversed the burden of proof by requiring the accused to prove a persuasive burden[152] as opposed to an evidential one.[153] The reversal of the burden of proof has serious implications for the presumption of innocence. Not only has it circumvented the common law presumption of innocence, it also appears to be inconsistent with Section 8(2)(a) of the 1979 Constitution which provides that;

> *"Every person who is charged with a criminal offence...shall be presumed to be innocent until he is proved or has pleaded guilty."*

That the 1979 Constitution is the superior law of SVG and that all other law should be drafted in conformity with it is provided under Section 101 of the 1979 Constitution.[154]

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[149] The defence of insanity

[150] Emmerson B., & Ashworth A., "Human Rights and Criminal Justice," Sweet & Maxwell, 2001, at p. 299, para 11-13

[151] Ibid at p. 270 para 9-44

[152] Ibid, para 9-03 at p. 256; *"A 'persuasive' burden of proof requires the accused to prove, on a balance of probabilities an ultimate fact necessary to the determination of guilt or innocence."*

[153] Ibid, para 9-04 at p. 256 – *"An evidential burden..., requires...that the accused must adduce sufficient evidence to raise an issue before it has to be determined by the tribunal of fact. Once the accused has adduced evidence sufficient to raise the issue, the burden of proving (or disproving) that issue rests on the prosecution."*

[154] Section 101 of the 1979 Constitution provided that; *"This constitution is the supreme law of St. Vincent and the Grenadines and, subject to the provisions of this Constitution, if any other law is inconsistent with this constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."*

Notwithstanding its superiority, the 1979 Constitution afforded the legislature sufficient flexibility to introduce legislation that requires the accused to prove particular facts in his case. In this regard Section 8(12)(a) provides that;

> *"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of –*
>
> *(a) subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."*

This section, although it in effect legitimises section 63, it will be argued that it does not necessarily follow that a section 63 provision should be applicable to every case in which a defence is raised. In a Privy Council case **Attorney- General for Hong Kong v Lee Kwong-kut**[155] the court indicated that in order to ascertain whether a reversal of the burden of proof respected the presumption of innocence it was necessary to identify the essential elements of the criminal liability which were imposed by the offence.[156] In that regard Lord Woolf stated that:

> *"There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtual impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence...Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable...If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless as was pointed out by the United States (1969) 23 L. ED. 2d. 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."*[157]

On the basis of the aforesaid statement by Lord Woolf, the defences provided by sections 42(4)(a) and (b) (see 5.8 above) are exposed to a challenge under the 1979 Constitution. Under those sections, by virtue of section 63, the accused is required to prove on a balance of probabilities that he did not form the suspicion or possess the knowledge that he was engaged in an arrangement which assisted another person to retain, control or benefit from the 'proceeds of criminal conduct.' Due to the reversal of

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155 [1993] A.C. 951
156 Ibid at 969C -970A
157 Ibid

the burden of proof that is mandated by section 63, the accused is exposed to being convicted in circumstances where the prosecution is unable to prove its case beyond reasonable doubt. A tribunal of fact that is in doubt about the accused's innocence or guilt may well convict him if he is unable to convince them that on a balance of probabilities he did not form the suspicion or possess the requisite knowledge.[158] In those circumstances the persuasive burden that is imposed on the accused requires him to prove his innocence. It is therefore argued that this cannot be justified, especially where the prosecution bears the responsibility of proving the elements of the offence beyond reasonable doubt.

Similarly, the accused, pursuant to section 42(4)(c) is entitled to a defence if he can prove on a balance of probabilities that he intended to disclose his suspicion or belief to a police officer but that *'there is a reasonable excuse for his failure'* to make the disclosure. However, although it is easier for the accused than for the prosecution to adduce evidence in support of his reason for failing to make the disclosure within a reasonable time, for the reasons mentioned in the foregoing paragraph, it nonetheless appears to be unfair to impose a persuasive burden on the accused in all the circumstances.

In response to a section 43(1) offence there are two defences. Section 43(2) absolves the accused from a section 43(1) offence if he can prove on a balance of probabilities that he provided adequate consideration for the acquisition, use or possession of property that represents the proceeds of criminal conduct. The other defence falls under section 43(7) wherein the accused will be acquitted if he is able to prove on the balance of probabilities that pursuant to section 43(5) of the PCMLA 2001, he intended to inform a police officer about his belief that any property represented the proceeds of criminal conduct but that he has a reasonable excuse for not doing so as prescribed under section 43(5)(b) of the PCMLA 2001. Although, it may well be easier for the accused than for the prosecution to show that he provided adequate consideration for the property, there are likely to be difficulties ascertaining what is or is not adequate in the circumstances. Similarly, the accused may encounter an uphill battle in his attempts to convince the court that his excuse for not reporting the matter to the police as prescribed by section 43(5)(b) is a plausible one. A similar argument can also be extended to a section

[158] R v Oakes 26 D.L.R (4th) 200 at p. 223

44(4)[159] defence which requires the accused to prove on the balance of probabilities that he had a reasonable excuse for not disclosing to a police officer his knowledge or suspicion that a person is engaged in drug money laundering.

The defence that is provided under section 45(4) also demonstrates the unfairness of the burden that is imposed by virtue of section 63. Section 45(4) provides that;

> *"In proceedings against a person for an offence under subsection (1) or (2), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way there in mentioned."*

The offences to which section 45(4) of the PCMLA 2001 relate are the tipping off offences that were discussed under 5.6 above, where it was noted that the drafting of section 45(2) is defective since it penalises those with knowledge or those who formed the suspicion that a disclosure was made to a police officer under sections 41, 42 or 43.[160] Section 45(4) will not offer any assistance to a person who is charged under section 45(2)(a) since the defence only relates to knowledge or suspicion that a disclosure was likely to be prejudicial to any investigation which might be conducted. At first appearance the section 45(4) defence provides some comfort to a person who is charged under section 45(2)(b) since he is entitled to show that he did not know or suspect that his disclosure was likely to prejudice an investigation. However, closer scrutiny of sections 45(2)(b) and 45(4) reveals that innocent persons are likely to be caught by section 45(2)(b) for reasons mentioned under 5.6 above.

More important however, is that section 45(2)(b) appears to be a crime of strict liability and one which is untenable in any modern civilised democratic society. It criminalises the disclosure of information that is likely to prejudice an investigation without the necessity of establishing the mental state of the accused. If the state of mind is not required to commit a section 45(2)(b) offence then requiring the accused to prove that he did not know or suspect that the disclosure was prejudicial to an investigation in order for him to have the benefit of a section 45(4) defence is tantamount to prescribing that he should prove his innocence. All the prosecution will be required to do under a section 45(2)(b) offence is to establish beyond reasonable doubt that the accused

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[159] Section 44(4) of the PCMLA 2001 provides that; *"It is a defence to a charge of committing an offence under this section that the person charged had a reasonable excuse for not disclosing the information or other matter in question."*

[160] Section 45(2)(a) of the PCMLA 2001

disclosed information that is likely to prejudice an investigation. Once that has been established, the offence would be consummated and a conviction may ensue.

Although a section 45(4) defence is prescribed as a defence to a section 45(1) offence, the reversal of the burden of proof is still problematic. This is so because a tribunal of fact that entertains any doubts that the prosecution has proven its case beyond reasonable doubt may still convict an innocent person if he fails to convince the tribunal on a balance of probabilities that he did not know or suspect that the disclosure was likely to be prejudicial to an investigation.

By virtue of section 8(12)(a) the legislature is granted some latitude to legislate in a manner that will assist law enforcement officials to more easily procure convictions. However, it does not provide carte blanche to the legislature to introduce legislation that will severely interfere with the right of the accused to a fair trial by undermining the common law and statutory presumption of innocence in the absence of any justification for so doing.[161] If section 8(12)(a) is otherwise interpreted, the 1979 Constitution will be contradicting itself and the presumption of innocence will bear little significance, if any at all. There will be times when it is justified for the legislature to interfere with the presumption of innocence. However, in those circumstances Lord Steyn suggested that '*...a legislative interference with the presumption of innocence requires justification and must not be greater than necessary.*'[162] An infringement of the presumption of innocence will usually be acceptable in circumstances where it is easier for the accused to adduce the evidence necessary to prove the issue than for the prosecution to do so.[163] Section 8(12)(a) has provided for those circumstances. It is therefore difficult to accept that the section should be interpreted to apply to situations where the infringement of the presumption of innocence is unwarranted. Nonetheless, section 63 of the PCMLA has made it mandatory that the reversal of the burden of proof must be on the balance of probabilities.

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161 Attorney General for Hong Kong v. Lee Wong Kong-Kut [1993] AC at pp 969H-970A: R v Hunt [1987] AC 352

162 R v Lambert [2001] 3 All ER 577

163 R v Edwards [1975] Q.B 27(CA) : R v Hunt [1987] AC 352: R v Schwartz (1988) 55 D.L.R (4th) 1 Supreme Court of Canada (SCC) : See also Emmerson B., & Ashworth A., "Human Rights and Criminal Justice", Sweet & Maxwell, 2001 at p 262 para 9-23 where it is stated that; '...a presumption will be easier to justify...if it relates not to a an essential element of the offence, but to a proviso, excuse, or the like.'

The proliferation of organised criminal activities and acts of terrorism may require a limited interference with certain rights of the individual. The lifeblood of those activities is the money that is generated to sustain them. Unless persons are legally obliged to make disclosures and refrain from providing assistance that will conceal the provenance of the property, money laundering and organised crime will continue unabated. This will have deleterious effects for the international community. In those circumstances one may argue that there is a justification for legislation that is consistent with section 8(12)(a) of the 1979 Constitution. But the seriousness of the offence is what may nonetheless warrant the restriction on the fundamental rights of the individual and create a cogent challenge to the constitutionality of section 63 of the PCMLA 2001.[164] As Langa J in the case **State v Mbatha** observed:

> *"The issue before us...is not simply whether there is a pressing social need to combat crimes of violence-there clearly is-but also whether the instrument to be used in meeting the this need is itself fashioned in accordance with specifications permitted by the constitution...The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If in particular cases, what is effectively a presumption of guilt is to be substituted for a presumption of innocence, the justification for doing so must be clearly established...There will no doubt be cases in which it will be difficult to prove that a particular person against whom the presumption would have operated, was in fact in possession of the prohibited article. If that person was in fact guilty, the absence of the presumption might enable him or her to escape conviction. But this is inevitably a consequence of the presumption of innocence: this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence.[165]"*

The flexibility afforded to the legislature by section 8(12)(a) should therefore be construed as liberal but restricted by the presumption of innocence. In this regard Sachs J in the South African Constitutional Court in the case of **State v Coetzee** observed that:

> *"There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public's interest in securing convictions of the guilty, the more important do constitutional protection of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that a particular criminal is brought to book...Hence the presumption of innocence, which serves not only to protect a particular individual on trial but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car jacking, housebreaking, drug-smuggling, corruption...The list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for the relic status as a doughty defender of*

[164] State v Coetzee [1997] 2 LRC 593 at pp 677-678 para 20
[165] [1997] 2 LRC 208 at pp. 215G to 222D

> *rights in the most trivial cases. The logic of this reasoning is inescapable. It is nevertheless right to say that in a constitutional democracy limited inroads on the presumption of innocence may be justified."*[166]

That statement of Sachs J has aptly supported the perspective that there may be justifiable reasons for a limited interference of the presumption of innocence. That is what section 8(12)(a) of the 1979 Constitution has facilitated. However, section 63 of the PCMLA 2001 seems to have gone too far. It has essentially provided that, irregardless of the circumstances of the case, the accused will be required to prove certain facts in issue on the balance of probabilities thus leaving no discretion to the courts.

There is a preponderance of cases[167] in Commonwealth countries in support of the perspective that a reversal of the burden requires the accused only to raise an evidential issue (otherwise referred to as an evidential burden). Emmerson and Ashworth have stated that in situations where an evidential burden is required the accused;

> *"...must adduce sufficient evidence to raise an issue before it has to be determined by the tribunal of fact. Once the accused has adduced evidence sufficient to raise an issue, the burden of proving (or disproving) that issue rests on the prosecution. In the final assessment of guilt, the burden on the accused is thus no more than a burden to raise a reasonable doubt as to guilt. The imposition of an evidential burden on the accused is not incompatible with the presumption of innocence."*[168]

Moreover, in those cases[169] the courts have expressly indicated that it is highly probable that innocent people will be convicted in circumstances where it is more appropriate for the prosecution to bear the burden of proving all the elements of the case rather than the defendant being imposed with a persuasive burden. In the Canadian case of **R v Oakes** Dickson J stated that:

> *"In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence, in question, violates the presumption of innocence...If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."*[170]

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[166] [1997] 2 LRC 593 at pp 677-678 para 20

[167] R v D.P.P ex parte Kebeline and others [1999] 3 WLR 972 House of Lords : R v Lambert [2001] 3 All ER 577: Sheldrake v D.P.P [2003] EWHC 273: R v Carcass [2002] 1 WLR 1714 : R v Whyte 64 C.R (3rd) 123 (SCC): R v Oakes 26 D.L.R (4th) 200 : State v Mbatha [1996] 2 L.R.C 208

[168] Emmerson B., & Ashworth A., "Human Rights and Criminal Justice," 2001, para 9-04 at p. 256.

[169] See note 165 above

[170] R v Oakes 26 D.L.R (4th) 200 at p 223

The cases that have, within recent times, examined the possible infringement of the presumption of innocence seem to conclude that a limited interference of the presumption of innocence is necessary (see above). However, they admit that it is only in exceptional circumstances that the accused may be required to prove certain facts on the balance of probabilities. It was noted above that Lord Woolf suggested that in determining whether the burden that is imposed on the accused should be evidential or persuasive the court should identify the essential elements of the offences. If having done so the accused is required to prove one of the essential elements of the offence then he should only bear an evidential burden.[171] That was a clear demonstration of the importance of the presumption of innocence in a democratic society. As Langa J observed:

> *"The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If in particular cases, what is effectively a presumption of guilt is to be substituted for a presumption of innocence, the justification for doing so must be clearly established...There will no doubt be cases in which it will be difficult to prove that a particular person against whom the presumption would have operated, was in fact in possession of the prohibited article. If that person was in fact guilty, the absence of the presumption might enable him or her to escape conviction. But this is inevitably a consequence of the presumption of innocence: this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence."*[172]

In **R v D.P.P *ex parte* Kebeline and Others**[173] Lord Hope suggested that in determining whether it is justified to interfere with the presumption of innocence a fair balance should be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual.[174] He further suggested that in determining that balance three questions should be considered; ***(a)*** what does the prosecution have to prove to transfer the onus to the defence?; ***(b)*** what is the likely burden on the accused – does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his own knowledge or to which he readily has access?; and ***(c)*** what is the nature of the threat faced by society which the provision is designed to combat?[175] It is arguable that the defences provided under Sections 42(4)(c), 43(7) and 44(4) and which relate to reasonable excuses that are required from the accused may be difficult for the prosecution to prove. But note the pronouncement of the Supreme Court of Canada.

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[171] Attorney -General for Hong Kong v Lee Kwong-Kut[1993] AC 951 at p. 973
[172] State v Mbatha [1996] 2 L.R.C 208 at pp 215G to 222D
[173] [1999] 4 ALL ER 801
[174] Ibid at p. 847.
[175] Ibid at pp. 848-849

> *"The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence... It is the final effect of a provision of the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of the facts as to the guilt of the accused."*[176]

That statement provides very strong *obiter* against the application of section 63 of the PCMLA 2001. Even more potent is the fact that sections 8(2)(a) and 8(12)(a) of the 1979 Constitution are similar in substance to Sections 11(d) and 1 of the Canadian Charter of Rights and Freedoms. Section 11(d) provides that; *"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."* Section 1 on the other hand provides that the rights that are provided by the Charter are subject to *'...such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'*

In spite of the three stage tests suggested by Lord Hope, it nonetheless appears that the test of necessity that was laid down in **R v Lambert**[177] reflects the preference of the English courts. Clarke J in reference to the test observed that; *"There have been a number of cases since R v Carcass but I do not read any of them as contradicting the conclusion that the test is one of necessity."*[178] What is significant about **R v Lambert** and the other cases abovementioned is that the courts were trying to determine on the face of the statute whether or not an evidential or a persuasive burden should be imposed on the accused. With regard to the PCMLA 2001, Section 63 has actually imposed a persuasive burden on the accused no matter what the circumstances. It is noteworthy that the PCMLA imposes very heavy penalties on those who are convicted and they are also exposed to further penalties if they are served with a confiscation order. For example, pursuant to section 47 of the PCMLA 2001 a person who is convicted for a summary offence may suffer a maximum penalty of five years imprisonment or a fine of $500,000 or both. An indictable offence on the other hand carries a maximum penalty of twenty years imprisonment or an unlimited fine or both.

In all the cases that have so far been considered the courts have demonstrated its concern for the likelihood of an innocent person being subject to such harsh penalties.

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[176] R v Whyte (1989) 51 DLR (4th) 481 at 493
[177] [2001] All ER 577
[178] Sheldrake v D.P.P [2003] EWHC 273 para 45

In **R v Lambert** a case in which the matter related to the possession of drugs, Lord Steyn stated that: *"Taking into account that section 28 deals with the situation where the accused is denying moral blameworthiness and the fact that the maximum prescribe penalty is life imprisonment, I conclude that the appellant's interpretation to be preferred. It follows that s 28 derogates from the presumption of innocence."*[179]

In Canada and South Africa the Courts are inclined to impose an evidential burden unless it is justified to do otherwise. It has been shown that the seriousness of the crime and the severity of the penalty had a significant influence on the decision to prefer an evidential burden as opposed to a persuasive burden. The Courts in England, including the Privy Council have also taken a similar position to the Canadian and South African Courts (often quoting their judgments in the decisions) especially since the introduction of the Human Rights Act 1998. In the light of the fact that SVG is a member of the Commonwealth and the Privy Council is still its final Court of Appeal, the journey of the courts on matters relating to the presumption of innocence is heading in the opposite direction to section 63 of the PCMLA 2001.

5.12.2 *Forfeiture Orders*

The PCMLA 2001 did not retain the forfeiture provisions of its precursor the PCA 1997. Under the PCA 1997 a forfeiture order could only have been made against a person after he had been convicted of any of the offences in the schedule to the PCA 1997.[180] The PCMLA has departed radically from the PCA 1997 by permitting a police officer to apply to the court of summary jurisdiction for a forfeiture order[181] for cash[182] which was detained by a police office above the rank of Inspector or a customs

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[179] [2001] 3 All ER 577

[180] Section 8(1) of the PCA 1997 (now repealed) provided that; *"Where the Director of Public Prosecutions applies to the court for a forfeiture order against property in respect of the conviction of a person for a scheduled offence and the court is satisfied that the property is tainted property, the Court may order that the property or such portion thereof as is specified by the Court in the order be forfeited to the Crown."*

[181] Section 50(1) of the PCMLA 2001 provides that: *"A court of summary jurisdiction may make an order ordering the forfeiture of any cash which has been seized under section 49 if satisfied on an application made by a police officer while the cash is detained under that section, that cash directly or indirectly represents any persons proceeds of, or benefit from, or is intended by any person for use in. criminal conduct."*

[182] Section 51(4) of the PCMLA 2001 provides that: *"cash means –*

(a) coins and bank notes in any currency; and

(b) *negotiable instruments"*

officer.[183] Moreover, all that is required of the police officer is for him to satisfy the court that the cash that was seized and detained, directly or indirectly, represented the person's proceeds of criminal conduct or that it was used or is intended to be used to commit an offence.[184] In effect, a forfeiture order can be made regardless of whether or not any proceedings have been or were to be initiated against the person for an offence to which the cash is allegedly connected.[185] Essentially, a forfeiture order can only be made in this way if there is a presumption that the cash was connected to or intended to be used for criminal conduct. Such a presumption appears to be inconsistent with the presumption of innocence required pursuant to Section 8(2)(a) of the 1979 Constitution.

Moreover, forfeiture orders historically were used to prevent crime by removing the 'thing' or 'instrument' that may have been used or is intended to be used for the commission of a criminal offence.[186] Under the PCA 1997 forfeiture orders maintained the historical context but the PCMLA has departed somewhat, where no crime has been committed and where no one has been convicted. Section 6(1) of the 1979 Constitution provides that:

> *"No property of any description shall be compulsorily taken possession of and, no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for payment, within a reasonable time, of adequate compensation"*

By virtue of that section a person is protected from deprivation of property without compensation. There are however several exceptions. The relevant exception is section 6(6)(ii) which provides that;

> *"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) ... by way of penalty for breach of any law or forfeiture in consequence of breach of any law."*

Essentially, section 6(6)(ii) permits the deprivation of property without compensation where there has been a violation of any law. It does not refer to an intention to break the

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[183] Section 49(1) of the PCMLA 2001 provides that: *"A police officer not below the rank of inspector or a customs officer may seize and detain, in accordance with this part, any cash which is being imported into or exported from Saint Vincent and the Grenadines if the officer has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct."*

[184] Section 50(1) of the PCMLA 2001

[185] Section 50(2) of the PCMLA 2001 provides that: *"An order may be made under subsection (1) whether or not proceedings are brought against any person for an offence with which the cash in question is connected."*

[186] Alldridge P., "Money Laundering Law," Hart, 2003, at p 59

law. But Section 50(2) of the PCMLA 2001 clearly stipulates that a forfeiture order may be made notwithstanding that there has not been a violation of any law and no proceedings have been brought against the person 'for an offence with which the cash is connected.' This seems to be inconsistent with section 6(6)(ii) and is therefore exposed to a challenge under the 1979 Constitution.

It is also noteworthy that no provision has been made in the PCMLA 2001 for the court to take into account that there has been the forfeiture of cash when it determines the extent of the punishment which should be imposed should there be a conviction. Provisions are made for the release of cash to enable the appellant 'to meet his legal expenses in connection with' an appeal[187] against the forfeiture and the cash may be released if the court considers it appropriate to do so.[188] Apart from those two circumstances the PCMLA 2001 does not otherwise provide for the release or set off of the cash forfeited against any previous or subsequent penalty. In effect the cash forfeited represents a penalty as opposed to a fine[189] which is imposed after the amount recovered under a confiscation order has been determined. A person who has been convicted for criminal conduct and had his cash forfeited may well find that he would have been punished twice for the same offence. Pursuant to section 8(5) of the 1979 Constitution; *"A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."* Section 8(6) of the 1979 Constitution also provides that a person who has

[187] Section 50(4) PCMLA 2001 provides that: *"On an application made by the appellant to a court of summary jurisdiction at any time, that court may order the release of so much of the cash to which the forfeiture order relates as it considers appropriate to enable him to meet his legal expenses in connection with the Appeal."*

[188] Section 50(2) of the PCMLA 2001 provides that: *"An appeal under this section shall be by way of rehearing, and the court may make such order as it considers appropriate and, in particular, may order the release of the cash (or any remaining cash) together with any accrued interest."*

[189] Section 7(5) of the PCMLA 2001 provides that: *"The Court shall then in respect of the principal offence-*

(a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and

(b) take into account the confiscation order before

(i) imposing any fine on him, or

(ii) making any other order involving any payment by him; but

(c) subject to paragraph (a), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant."

been pardoned for a criminal offence shall not be tried for the offence of which he was pardoned.[190]

Although the two sections do not mention punishment, it is herein argued that they should be interpreted as if punishment was also included to the extent it excludes double punishment for the same offence. A criminal conviction is generally followed by punishment and the purpose[191] of the double jeopardy provision in the 1979 Constitution is to prevent a person being exposed to double punishment after he has been tried and convicted. To exclude punishment when interpreting those sections will result in a most unfortunate conclusion because the ultimate purpose of a trial is to ascertain culpability or determine innocence. The person who is culpable is generally punished. The innocent person obtains an acquittal. Therefore, one of the major concerns about trying a person twice for the same offence relates to the likelihood of that person being punished. Accordingly, the sections should be interpreted to mean also that a person should not be punished twice for the same offence.[192] Such is the perspective of the International Covenant on Civil and Political Rights (ICCPR) which provides that; "*No one shall be liable to be tried or punished again for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of each country.*"[193]

It was mentioned above that no provision has been made to take into account the forfeiture of cash when determining the punishment to be imposed for the conviction of an offence. Therefore, the convict will be accorded punishment for the principal offence[194] which will be separate and distinct from the cash that is forfeited and which is connected to the principal offence. In effect, the convict will be exposed to double punishment for the same offence. In this regard Alldridge observed that; "*The*

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[190] Section 8(6) of the 1979 Constitution of St. Vincent and the Grenadines provides that: "*A person shall not be tried for a criminal offence if he shows that he has been pardoned for that offence.*"
[191] Pepper v Hart [1993] AC 593
[192] R v Beedie [1998] QB 356
[193] Article 14(7)
[194] Section 7(5) of the PCMLA 2001 provides that: "*The court shall then in respect of the principal offence;*

(a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and
(b) take into account the confiscation order before
  (i) imposing any fine on him, or
  (ii) making any order involving any payment by him; but
(c) subject to paragraph (a), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant."

fundamental objection to forfeiture on conviction is that unless treated as a fine, it constitutes double punishment."[195] Accordingly, the forfeiture provisions of the PCMLA 2001 are also exposed to challenges under section 8(5) of the 1979 Constitution.

5.13 *The PCMLA 2001 and the PCA 1997*

When the offence of money laundering in the former PCA 1997 is compared with the money laundering offences in the PCMLA 2001 there is noticeably little difference in the overall effect. Pursuant to Section 59(2)[196] of the PCA 1997 the offence of money laundering was created. Section 59(3) provided that;

> *"A person shall be taken to engage in money laundering where –*
>
> > *(a) the person engages, directly or indirectly, in a transaction that involves money or other property, that is the proceeds of crime; or*
> >
> > *(b) the person receives, possesses, conceals, disposes of, or brings into St. Vincent and the Grenadines money or other property that is the proceeds of crime.*
>
> *and the person knows or ought reasonably to know, that the money or other property is derived, obtained or realised, directly or indirectly from some form of unlawful activity."*

The other relevant offence under the PCA 1997 was provided under Section 61 which states that:

> *" person who, after the commencement of this Act, receives, possesses, conceals, disposes, of or brings into Saint Vincent and the Grenadines any money, or property that he knows or ought reasonably to know to be the proceeds of crime commits an indictable offence..."*
>
> *"It is a defence to a charge for an offence against this section, if the person satisfies the Court that he did not know or had not reasonable grounds for knowing the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity."*

Essentially, Section 59(3) provided that any involvement by a person in money or property that represented the proceeds of crime was prohibited. The person so involved would have been guilty of the offence of money laundering. To be absolved from liability that person would have been required to show that he did not know or could not have reasonably known that the money or property was in some way derived from unlawful activity. In order to further appreciate what property was likely to be incriminating, the definitions of 'proceeds of crime' and 'unlawful conduct' were paramount. 'Proceeds of crime' was defined to include:

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[195] Alldridge P., "Money Laundering Law," Hart, 2003, at p 117

[196] Section 59 (2) PCA 1997 now repealed provided that; *"A person who, after the commencement of this Act, engages in money laundering commits an indictable offence..."*

> (a) *"proceeds derived from the commission of scheduled offences; or*
> (b) *any property or benefits derived, obtained, realised, directly or indirectly, by any person from any act or omission that occurred outside St. Vincent and the Grenadines and would, if it had occurred in St. Vincent and the Grenadines, constituted a scheduled offence."*[197]

The definition of the proceeds of crime was admittedly a bit convoluted. The phrase, 'proceeds of crime' was used in the wording of the money laundering offence without further clarification. However, when seeking clarification by examining its definition, one was required to go back to the offence of money laundering which was a scheduled offence to ascertain how the proceeds were derived. In spite of the somewhat circuitous definition of 'proceeds of crime,' the money laundering offence, nonetheless, achieved greater clarity from the definition of 'unlawful activity.' Section 2 of the former PCA 1997 defined 'unlawful activity' as:

> *'an act or omission that constitutes an offence against a law in force in St. Vincent and the Grenadines or against a law of any other country.'*

Therefore, once an offence was committed any where, provided that it constituted an offence in SVG and the property[198] was derived from that offence, any involvement in or with such property could have constituted the offence of money laundering. In order to be guilty of the offence of money laundering the prosecutor was required to prove beyond reasonable doubt that the accused knew or ought reasonably to have known that the money or property to which he was connected was derived from unlawful activity. When Section 59(3) and 61 were taken together they seemed to have covered all the offences in the PCMLA 2001 except the offences of tipping off and failing to report suspicion of money laundering.

Sections 41 and 42 of the PCMLA 2001 are in *pari materia* with sections 22 and 21 of the DTOA 1993 respectively. Apart from the extension of sections 41 and 42 to include offences other than drug trafficking there appears to be little difference in the *mens rea* elements which in the PCMLA 2001 is 'knowing or having reasonable grounds to suspect' whereas under the DTOA 1993 the *mens rea* element is 'knowing or having reasonable grounds to believe.' The *mens rea* element of 'knowledge' was discussed above but 'reasonable grounds to believe' and 'suspicion' were discussed in chapter 4. It is noticeable that those two PCMLA 2001 offences are also captured under the two

[197] Section 2 of the PCA1997 now repealed
[198] Section 2 of the PCMLA 2001 defines property to include; *"money and all other property real or personal, things in action and other tangible property."*

limbs of the money laundering offence under Section 59(3) of the PCA 1997. It is also important to note that whereas sections 41(1) and (2) of the PCMLA 2001 offences require the prosecution to prove that the accused concealed, disguised, converted or transferred the proceeds of criminal conduct with the intention of avoiding a prosecution or the making or enforcement of a confiscation order or assisting a person to do so, under sections 59 and 61 of the PCA 1997 no such proof was required.

The lower threshold of 'reasonable grounds to suspect' under sections 41 and 42 of the PCMLA 2001 gives the appearance that it is much easier to procure a conviction than previously under 'reasonable grounds to believe.' But note the observations of Alldridge:

> *"In these offences both knowledge and suspicion are to be judged subjectively. It does not matter that there was reasonable grounds to suspect if in fact the defendant did not suspect. This has led to complaints by prosecutors about the difficulties of proof imposed by this subjective requirement. The Cabinet Office claimed that the professional who 'turns a blind eye' avoids liability, and used this as the justification for the introduction of an objective test of reasonable grounds to suspect. This, however, is contentious for two reasons. First 'knowledge' in criminal statutes has been held to comprehend 'wilful blindness.' Second, it would be inconsistent with the general understanding that negligence is not sufficient for a conviction for a serious crime."*[199]

McCormack is also of the view that with regard to Section 41 of the PCMLA 2001 introducing 'reasonable grounds to suspect' into the *mens rea* element may be otiose. He stated that "... *if the prosecution managed to prove that a person had acted in order to assist some one to avoid prosecution it would be followed that that person must know or believe that the property he is dealing with is the proceeds of criminal conduct. To import into the definition the necessity for having reasonable grounds to suspect appears to be somewhat nonsensical.*[200] There is case law[201] to support the perspective that not only must there be reasonable grounds for suspicion but that the accused must himself have formed the requisite suspicion.[202] Therefore, if he did not form that suspicion he ought not to be liable. Interestingly, in a country with a people that are avid for scandal it is highly probable that the requisite suspicion will be formed. It is nonetheless important to note that there has still not been a money laundering prosecution, let alone conviction since the PCA was introduced in 1997. Does that make any difference to reasonable grounds to believe or reasonable grounds to suspect in the practical sense? By extension, would the

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[199] Alldridge P., "Money Laundering Law," Hart, 2003 at p 183
[200] McCormack G., "Money Laundering and Banking Secrecy," The Company Lawyer Vol. 16 No. 8, 1995 at p 8
[201] Nakkuda Ali v Jayaratne [1951] AC 66
[202] R v Harrison [1938] 3 All ER 134

difference between reasonable grounds to believe or reasonable grounds to suspect encourage more investigations and prosecutions? The experience so far has not shown any difference.

The offences that were created under sections 43(1) and 44(2) of the PCMLA 2001 are also captured under sections 59 and 61 of the PCA 1997. Although section 44(2) is an offence of failure to report drug money laundering the conduct that will offend section 44(2) will also violate sections 59 and 61. For example, the requisite knowledge or suspicion must have been acquired through work etc. This therefore implies that there may well have been a transaction between the launderer and some one at the work place which will bring the transgression under the first limb of section 59(3). The offences of tipping off (section 45) and failing to report a suspicious transaction (section 46) are in effect the two new offences. Although they are welcomed additions to the money laundering legislation their absence was not pivotal to SVG being placed on the blacklist (see chapter 4) and the manner in which they were drafted may not be altogether helpful to SVG's anti-money laundering efforts. For example, the flaws in the wording of section 45(2) have essentially produced offences that should not be tolerated in any democratic society. In so far as section 46 is concerned the manner in which a legal obligation is imposed on persons to report on each other in a small country with a small population also has serious disadvantages which may well be counterproductive to the implementation of the money laundering legislation.

Section 46(1) has in effect imposed upon financial institutions and any person who is engaged in a relevant business activity, the role and responsibility of law enforcement officials. An additional responsibility to ensure that compliance programmes are instituted and that staff are appropriately trained is also imposed. Together, these responsibilities, though important, can also be very onerous,[203] especially where in reality the majority of service providers are very small with very few staff members. Moreover, the dearth of commercial activity in SVG negatively impacts on the level of income that is earned by financial institutions and those involved in relevant business activities in particular. Therefore, the added cost of the compliance programme and the mechanism that is necessary to maintain effective vigilance of commercial activity may be a prohibiting factor for those who intend to provide financial and other relevant services. Similarly, those who are already providing the relevant services may find that

[203] Wadsley J., "Money Laundering: Professionals as Policemen," The Conveyancer 1994, at pp. 286-287

the cost and time involved in order to comply may be so onerous that a greater portion of their time may be spent conjuring up ingenious ways that are likely to circumvent the requirements of section 46 as opposed to complying with that section.

It is also noteworthy that section 46 was introduced at a time when no money laundering case had ever been brought before the court. Interestingly, even after the introduction of section 46 and up to the time that SVG was removed from the FATF blacklist, no one had ever been convicted of a money laundering offence. Essentially, the section encourages an invasion into the privacy of the affairs of individuals - both the criminals and law abiding persons. Such invasion is a serious impediment to the viability of the OFSS in particular and financial services in general since law abiding persons will undoubtedly be very reluctant to have their financial affairs exposed and placed under constant supervision[204] and therefore, may not consider SVG as a desirable investment opportunity. It is also very important to note that privacy is the bedrock on which offshore financial services was established. Any attempts to undermine the maintenance and preservation of privacy and confidentiality will undoubtedly have a detrimental effect on the OFSS in particular and the economy as a whole. Such a state of affairs was in evidence with the drastic reduction of offshore activity following the blacklisting of SVG. Mention of the adverse impact on the economy of SVG has already been made in chapter 1.

In the previous chapter it was noted that when laws are being drafted, special attention should be paid to the culture of the people who are regulated by those laws and the persons who are required to administer the laws. It has also been noted in the previous chapter that the people of SVG are avid for scandal. Section 46 by requiring the formation of a mere suspicion as a prerequisite to the reporting of a transaction is essentially empowering those that are consumed with envy, jealousy, enmity and political aspiration to embarrass those who appear to be successful or against whom they bear a grudge by reporting them to law enforcement officials. This unfortunate situation is further compounded by section 46(5) of the PCMLA which grants immunity from prosecution for those who reported what they considered to be a transaction that they suspected to be involved in money laundering activity.[205]

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[204] Ibid at p. 287

[205] Section 46(5) of the PCMLA 2001 provides that: *"When the report in subsection (3) is made in good faith, the financial institutions or persons engaged in relevant business activities and their employees, staff, directors owners or other representatives as authorised by law, shall be exempted from criminal,*

SVG is a very small country with a very small population of approximately 117,000 people. Most of its inhabitants are either likely to be blood related or closely connected in some other way. Therefore, any suspicious activity report that is made is likely to be against a friend, relative or an acquaintance. Similarly, any prosecution that is being brought is likely to be against a friend, a relative or an acquaintance. Therefore, making a report of a suspicious activity which turned out to be unnecessary and unwarranted or which did not result in a prosecution for whatever reason may have disastrous consequences for the person making the report. Yet if the report is not made the penalty for non-compliance can be severe and includes imprisonment.

To encourage the residents of SVG to report against each other may not be productive, especially when the very reason for making the report is also responsible for increases in employment and poverty levels. The imposition of such responsibilities on civilians in SVG can also be seen as a result of the failure by FATF countries to control criminal activities within their borders. The question is whether it is fair and equitable for a small country like SVG to be lumbered with the unreasonable burden of assisting the FATF countries to fight the criminal activities that occur in those countries? It may be argued that it is only fair that SVG participates since it is also the beneficiary of the economic prosperity of FATF countries which enabled their residents to acquire the substantial sums of monies that are sent abroad in search of further investment opportunities in offshore jurisdictions like SVG. Further questions may be asked as to whether SVG could be of assistance without having to suffer economic difficulties? It can be argued that the manner in which section 46 was drafted was detrimental to the financial services sector in SVG since it had the effect of reducing the commercial viability of the sector.

The government of SVG was forced by the OECD/FATF to introduce measures like section 46 which may well turn out to be counter productive as opposed to retaining section 51 under the previous PCA 1997 which did not criminalise the non-reporting of suspicious activity but instead encouraged financial institutions to report information that is relevant to an investigation or prosecution of an offence. The money laundering offences under the PCA 1997 could nonetheless have been used to charge a person who

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civil or administrative liability as the case may be, for complying with this section or for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, regardless of the result of the communication."

failed to report the aforesaid information as being directly or indirectly involved in the money laundering process and therefore it could be argued that criminalising the non-reporting of information was unnecessary. However, due to the extent of organised criminal activities in FATF countries and the significance of anti-money laundering activities as a deterrent to the preservation of international crime, SVG has a responsibility to ensure that its jurisdiction is not a safe haven for criminals. Suspicious activity reporting is necessary but within the context of SVG it is argued that the reporting should not be based on a mere suspicion but on reasonable grounds to believe. In this way criminalising the non-reporting of the relevant information would not appear to be counterproductive since in any event those who failed to report may also be captured under another money laundering offence as being either directly or indirectly involved in the money laundering process.

It is however noteworthy that as a matter of fact the PCA 1997 was not criticised in the FATF's Report on its review of SVG. Interestingly, the manner in which the PCA 1997 was drafted ensured that those who actually committed an offence and were prosecuted stood a greater chance of being convicted. It is also noteworthy that the three offences under the PCA 1997 were the only provisions that were retained under the PCMLA 2001 by virtue of section 68 of the PCMLA 2001. No reason was however given for the retention of those three offences. That was rather strange especially in the light of the fact that the government had refused to apprehend a person[206] for whom a warrant for his arrest for money laundering charges was issued by the USA. [207]

Mr. Thiery Nano was the principal of two offshore banks in SVG. These were New Bank Limited and Nano and Sons 1146 Private Bankers Limited whose banking licenses were revoked in June 2000[208] under the previous administration which lost the general elections in March 2001. A warrant for Mr. Nano's arrest was issue by a court in the Florida district in late 2001 following an investigation by the Federal Bureau of Investigation (FBI).[209] Although the law enforcement authorities in SVG received the warrant from the USA they failed to execute it and allowed Mr. Nano to leave the

[206] Mr. Thierry Nano
[207] www.geodrugs.net., "One Money –Laundering Case with Three Governments Involved," Geopolitical Drug Newsletter No. 9 - June 2002 at pp. 1-4
[208] Information from the Offshore Finance Authority of SVG.
[209] www.geodrugs.net., "One Money –Laundering Case with Three Governments Involved," Geopolitical Drug Newsletter No. 9 - June 2002 at p. 1

country.[210] The Prime Minister Dr. Ralph Gonsalves (a lawyer), who had just taken political office a few months earlier, explained that the laws in SVG did not permit the law enforcement authorities to apprehend and/or extradite Mr. Nano for money laundering charges.[211] That was a rather puzzling admission since section 59(3) of the PCA 1997 clearly criminalised money laundering which involved an unlawful activity[212] that occurred in any other jurisdiction. Moreover, section 30(1)(a) and (e) of the Criminal Procedure Code Chapter 125 of the 1990 Revised Laws of SVG provides as follows:

> *"Any police officer may, without an order from a magistrate and without a warrant, arrest-*
>
> > *(a) any person whom he suspects upon reasonable grounds of having committed an indictable offence;*
> >
> > *(e) any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of Saint Vincent and the Grenadines which, if committed in St. Vincent and the Grenadines would have been punishable as an offence, and for which he is under the fugitive Offenders Act, or any other law relating to extradition and in force in Saint Vincent and the Grenadines, or otherwise liable to be apprehended and detained in Saint Vincent and the Grenadines;"*

Pursuant to section 59(2) of the PCA 1997 money laundering is an indictable offence. Moreover, the receipt of a warrant from the USA law enforcement authorities is sufficient to raise reasonable grounds for suspicion that a money laundering offence had been committed. Section 30(1)(e) empowers a police officer to make an arrest without a warrant but in the case of Mr. Nano a warrant for his arrest was issued. There was also the 1996 Extradition Treaty between SVG and the USA (see chapter 3.10) which made money laundering an extraditable offence. Mr. Nano should therefore have been arrested by the law enforcement officials under the laws of SVG. It was therefore most unfortunate that inspite of the Prime Minister's pronouncement (see 5.3 above) in parliament to strengthen the money laundering laws of SVG, when it came to enforcing them against Mr. Nano, for whatever reason, they seemed to have been misinterpreted in favour of Mr. Nano.

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[210] Ibid at p. 2
[211] Ibid
[212] Section 2 of the PCA 1997 (now repealed) defined 'unlawful activity' to include, *"an act or omission that constitutes an offence against a law in force in Saint Vincent and the Grenadines or against a law of any other country."*

It is however interesting to note that the government of SVG, shortly after it assumed office following the victory at the polls on 31st March 2001, reinstated[213] the two aforesaid offshore banking licenses that were revoked by the previous administration.[214] It was also noted in chapter 4.13 that there were allegations that the Nano family contributed substantial sums of money to the election campaign of the current administration which enabled it to secure victory at the polls. Essentially, the FATF's blacklisting appears not only to adversely affect the OFSS, it had political implications as well. Only time will tell how well the money laundering laws are likely to be manipulated and enforced to facilitate a political agenda.

The *mens rea* element of "knowledge" under the PCA 1997 may not have been fatal to the procuring of a money laundering conviction, especially where the ambit of knowledge had been extended to include wilful blindness and where knowledge was also measured against that of a reasonable man as opposed to knowledge of the accused. Moreover, the PCA 1997 only provided one defence[215] to any of the three offences and that defence was available to the accused without the imposition of any mandatory burden of proving his lack of knowledge of an unlawful activity. The PCMLA 2001 on the other hand has made provisions for defences to all but two of the six offences[216] that it has created. The application of those defence provisions maybe inconsistent with certain requirements of the 1979 Constitution, especially because of the mandatory reversal of the burden of proof that is prescribed by section 63 of the PCMLA 2001. Other inconsistencies may also be derived from the forfeiture provisions of the PCMLA 2001. By exposing those provisions to challenges under the 1979 Constitution, the effect of the PCMLA 2001 may be weakened. Alternatively, the inconsistency of the provisions with the 1979 Constitution may also result in human rights abuses.

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[213] The lawyer that acted for the previous administration was removed and replaced by a lawyer appointed by the new administration. The new administration's lawyer and the lawyer for the offshore banks agreed by consent that there were insufficient grounds for revoking the banking licenses. Accordingly, a consent order was issued, reinstating the licenses.

[214] www.geodrugs.net., "One Money -Laundering Case with Three Governments Involved," Geopolitical Drug Newsletter No. 9 - June 2002 at p. 3

[215] Section 61(2) of the PCA 1997 (now repealed) provided that: *"It is a defence to a charge for an offence against this section, if a person satisfies the Court that he did not know or had not reasonable grounds for the knowing that the property referred to in the charge was derived or realized, directly or indirectly, from some form of unlawful activity."*

[216] Sections 41 and 46 of the PCMLA 2001.

5.14 *Amendments to the International Trust Act (ITA) 1996*

The ITA 1996 was amended on 13th May, 2002 mainly for the purposes of housekeeping and according greater powers to the Registrar of Trust to request information from Registered Trustees. However, the concerns that the FATF expressed in its June 2000 evaluation report were not effectively addressed. It was noted in chapter 4.5 that one of the FATF's main concern was the difficulty ascertaining the identities of the settlor, trustees and beneficiaries of the trust. No amendments were made in that regard. Instead there was an amendment to Section 63(1)(b) of the ITA 1996 which provided as follows:

> *The Registered Trustee of an international trust created under this Act shall keep as confidential information in the territory of the State...;*
>
> *(b) a register in which the following information is set out*
>
> *(i) the name of the settlor and the name of the beneficiary or the beneficiaries and the names of the trustee or trustees and where applicable the name of the protector..."*

This amendment rather than making provision for the disclosure of the identities of the settlors, trustees and beneficiaries of an international trust it has effectively made it more difficult for those identities to be disclosed. Although the identities of the settlor and the trustees are required to be disclosed to the OFA when a trust is initially created,[217] there were nonetheless concerns about ascertaining the identities of settlors and beneficial owners that were IBCs.[218] Accordingly, the amendment did not solve the mischief that parliament should be trying to avoid. If those IBCs were bearer share companies then the ultimate beneficial owners (e.g. natural persons) should be ascertained. But note that the amended ITA 1996 reinforced the privacy and confidentiality of the identities of the settlors and beneficiaries. Although the amended ITA was not consistent with the FATFs assessment criteria SVG was nonetheless removed from the blacklist. Yet it was the concealment of the identities of the settlors and beneficiaries of an international trust that contributed to the blacklisting of SVG in the first place.

[217] See chapter 4.5.1.1
[218] Ibid

5.15 *Amendments to the International Business Companies (IBC) Act 1996*

The IBC 1996 was amended on 13th May, 2002 in order to immobilise bearer shares. In effect bearer shares could still be issued by IBCs. However, the amendment imposed on Registered Agents the responsibility of retaining the bearer share certificate in their custody and prohibited them from delivering the share certificates to the owners of IBCs.[219] In this way transfers were not required to be made without the authorisation of the Registered Agent who in turn had a legal obligation to maintain proper records which contained the particulars of each bearer share holder.[220] The IBC Act was further amended on 7th November, 2002 to in order to penalise Registered Agents for any refusal to comply with the requirements pertaining to the custody of a bearer share certificate and the proper maintenance of records of the particulars of owners of bearer shares.[221]

It is interesting to note that prior to the meeting with the FATF in Miami, USA in June 2000 the representatives of SVG and the British Virgin Islands (BVI) discussed a plan to retain bearer shares and the plan was to immobilise them in the manner as explained above.[222] Both the BVI and SVG discussed the plan with the FATF but the BVI with over 300,000 IBCs[223] at the time was not put on the blacklist but SVG with just about 10,000 IBCs[224] was blacklisted. It is also noteworthy that criteria 5,[225] 12[226] and 13,[227] of the 25 criteria for assessing non-cooperative countries and territories all had

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[219] See also chapter 2.4.2

[220] Section 22(2) of the IBC Act 1996 (as amended) provided that: *"Every registered agent shall maintain a record of each bearer certificate issued or deposited in its custody and the record shall contain the following information:*

- *(a) the name of the company issuing the bearer certificate;*
- *(b) the identification number of the bearer share certificate;*
- *(c) the number of shares and the class of shares in the company contained in the bearer certificate*
- (d) *the identity of the beneficial owner of the shares in the bearer share certificate, including but not restricted to the name, address, date of birth and other details of identification as may be prescribed by the Minister..."*

[221] Section 22(4) of the IBC Act 1996 (as amended) provided that: *"A registered agent who refuses or fails to comply with the provisions of this section other than subsection (8) commits an offence, and shall be liable on summary conviction*

- *(i) in the case of a company, to a fine of twenty thousand dollars; or*
- (ii) *in the case of a natural person, to a fine of twenty thousand dollars or to a term of imprisonment not exceeding twelve months..."*

[222] Discussion with representatives from SVG.

[223] Records at the BVI Financial Services Authority

[224] Records at the St. Vincent and the Grenadines Offshore Finance Authority.

[225] See also chapter 4.5.1

[226] See also chapter 4.8

[227] See also chapter 4.9

implications for bearer shares and SVG was adjudged to have fallen within those criteria. The plan to immobilise bearer shares did not change, it remained the same, yet SVG was nonetheless removed from the blacklist.

5.16 *Exchange of Information Act (EIA) 2002*

The EIA 2002 was passed in the House of Parliament on 29th May, 2002 and became effective on 30th May, 2002. The object of the Act was to *'make provision for assisting overseas regulatory authorities to obtain information from within Saint Vincent and the Grenadines and other related matters.'* By virtue of Section 9 of the EIA 2002 the CRPA 1996 was repealed. During the Parliamentary debate on the Exchange of Information Bill (EIB) 2002, the Prime Minister Dr. Ralph Gonsalves expressly indicated that the EIB 2002 was introduced and the CRPA 1996 was repealed in order to comply with the requirements of the 25 criteria for assessing non-cooperative countries and territories.[228] It is noteworthy that the FATF concluded categorically that under criteria 7,[229] 8[230] and 9[231] of the 25 assessment criteria 'no secrecy provisions' were identified. What this effectively meant was that the CRPA 1996 in spite of its nomenclature was not in any way designed to impede the activities of law enforcement officials.

The FATF expressed two concerns with the CRPA 1996.[232] The first was that the Offshore Finance Inspector should not be required to obtain the prior approval of the Minister of Finance when providing assistance to a foreign state.[233] The second related to the restriction imposed by Section 3(3)(b)(iii) of the CRPA 1996 on the disclosure of information relating to tax and revenue law matters.[234] Both concerns were extensively discussed in chapter 4 in which the FATF's misconception was emphasised. Since those were the only concerns of the FATF it is difficult to reconcile the reason for the repeal of the CRPA 1996 with the requirements of the 25 assessment criteria of the FATF.

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[228] St. Vincent and the Grenadines Parliamentary Debate 29th May, 2002 at pages 30, 35 and 36.
[229] FATF Criterion 7, *"Legal or practical obstacles to access by administrative and judicial authorities to information with respect to the identity of the holders or beneficial owners and information connected with the transactions recorded."*
[230] FATF Criterion 8, *"Secrecy provisions which can be invoked against, but not lifted by competent administrative authorities in the context of enquiries concerning money laundering."*
[231] FATF Criterion 9, *" Secrecy provisions which can be invoked against, but not lifted by judicial authorities in criminal investigations related to money laundering."*
[232] FATF's Report on St. Vincent and the Grenadines Against the Criteria For Assessing Non-Cooperative Countries, 20th June, 2000 at pp 5-6
[233] See Criterion 16 and discussion thereon in chapter 4.10
[234] See Criterion 18 and discussion thereon in chapter 4.11

Under the CRPA 1996 once a person was charged with a criminal offence there was no restriction on the disclosure of information relating to the criminal investigation.[235] Under the EIA 2002 there are five conditions which must be satisfied before information could be disclosed to a foreign regulatory authority.[236] Section 3(2) of the EIA provides that:

> *"A regulatory authority shall not exercise the powers conferred by section 4 unless it is satisfied that;*
>
> > ***(a)** the assistance is necessary for the purpose of enabling or assisting a foreign regulatory authority in the exercise of its regulatory functions;*
> > ***(b)** the assistance requested by the foreign regulatory authority may be granted under any agreement to which Saint Vincent and the Grenadines and the foreign State requesting authority are parties;*
> > ***(c)** the foreign regulatory authority requesting the assistance has given a written undertaking to provide corresponding assistance to an authority exercising regulatory functions in Saint Vincent and the Grenadines;*
> > ***(d)** the nature and seriousness of the matter to which the inquiries relate and the importance to the inquiries of the information sought in Saint Vincent and the Grenadines warrant disclosure of the information;*
> > ***(e)** the assistance cannot be obtained by other means; or*
> > ***(d)** the relevant country or territory has enacted similar laws with relation to the exchange of information."*

Admittedly those conditions do not restrict the type of information that can be disclosed. They nonetheless appear to be more restrictive than the provisions under the CRPA 1996. The money laundering initiative seeks to deter serious crime by taking the profits out of crime. In that regard the CRPA 1996 could not be taken to be severely restrictive of the money laundering initiative. SVG appeared to be open to bilateral treaty negotiations. This was demonstrated with the execution of the MLAT with the USA in which there are provisions for the disclosure of criminal tax information.[237] On that basis it was open to other countries to negotiate such terms in a treaty arrangement with SVG.

Moreover, under the EIA 2002, if the information that is requested raises an issue of public interest then the regulatory authority[238] from which the information was

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[235] Section3 (3) of the CRPA 1996 now repealed

[236] Section 2 of the EIA 2002 defines foreign regulatory authority to mean *'a statutory authority which in a country or territory outside St. Vincent and the Grenadines, exercises functions of a regulatory authority.'*

[237] See criteria 18 and 22 under chapter 4.11

[238] Section 2 of the EIA 2002 defines regulatory authority as *"Regulatory Authority means any authority specified in the Schedule to this Act. Under the Schedule to the Act the following are regulatory authorities: The Attorney General, The Registrar of Companies, The Registrar of International Business Companies, The Registrar of Insurance, The Registrar of International Insurance, The Commissioner of*

requested is required to obtain *'written direction from the Attorney General before providing the information requested.'*[239] A further condition that did not exist under the CRPA 1996 was the requirement that prior to the provision of assistance by the regulatory authority, the foreign regulatory authority should confirm in writing that it was prepared to contribute to the cost of providing the assistance.[240] Interestingly, the EIA 2002 penalised any one who disclosed information that was obtained either from a foreign regulatory authority or *'by virtue of the exercise of powers under the Act.'*[241] But it is nonetheless perceived to be concerned primarily with the disclosure of information. The CRPA Act 1996 on the other hand also penalised those who disclosed confidential information contrary to the Act but it was perceived to be primarily concerned with banking secrecy and confidentiality. Essentially, the EIA 2002 permitted the disclosure of information provided certain conditions were satisfied, whereas the CRPA 1996 restricted the disclosure of confidential information unless certain conditions were satisfied.

The EIA 2002 provides the mechanism whereby regulatory authorities in SVG are able to obtain information about a foreign prospective investor or investor in order to check the veracity of any representation that person has made. Its provisions empower a regulatory authority to request from any financial institution information on the financial status of any of its customers.[242] Any refusal[243] by that financial institution to accede to the request constituted an offence[244] punishable by a fine of one hundred thousand dollars or two years imprisonment or both.[245] The EIA 2002 makes it easier for regulatory authorities to obtain information about the financial affairs of investors. Therefore, if the power that is reposed in those regulatory authorities is not managed, controlled and used sparingly and appropriately then it seems reasonable to presume that secrecy and confidentiality in financial affairs will fast become an endangered species.

International Insurance, The Ministry of Finance, The Offshore finance Authority, The Registrar of Mutual Funds, The Registrar of International Trusts."

239 Section 3 (3) of the EIA 2002

240 Section 3(5) of the EIA 2002

241 Section 5 of the EIA 2002

242 Section 4(1) of the EIA 2002

243 Section 4(2) of the EIA 2002 provides that; *"If a person fails to comply with a request issued under subsection (1) within three days from the date of the request or such longer period as a regulatory as a regulatory authority may permit, the Attorney General at the request of the regulatory authority may apply to a Judge in Chambers for an order requiring the person to comply with the request."*

244 Section 7 (1)of the EIA 2002

245 Section 7(4) of the EIA 2002

It is therefore argued that the power granted to regulatory authorities under the EIA 2002 was unnecessary. The MACM Act 1993, the MLAT,[246] and the CRPA 1996 together with the common law principles that were laid down in **Tournier v National Provincial Bank**[247] and which required banks to make disclosures under certain circumstances, provided an adequate legislative framework for the disclosure of information to foreign authorities. Moreover, following the decision of **Robertson v Canadian Imperial Bank of Commerce**[248] there seemed to be no such thing as banking confidentiality in SVG. In an environment where every one[249] has a legal obligation to disclose information without the requirement of a court order, such a state of affairs does not encourage investment from both local and foreign investors alike. In essence, SVG went beyond what the FATF assessment required at the cost to its commercial attractiveness.

5.17 *Conclusion*

Although, there have been some administrative niceties in the confiscation and enforcement procedures that are outlined in the PCMLA 2001 they will only gain relevance and significance where there has been a conviction. Interestingly, apart from the defence to a charge under Section 61 of the PCA 1997 no other defences were provided under the PCA 1997. The defences outlined in the PCMLA 2001, due to the reversal of the burden of proof requirement under section 63, are indeed exposed to challenges under the 1979 Constitution. The forfeiture provisions are also vulnerable to challenges under the 1979 Constitution. Under the PCA 1997 fewer defences and loop holes meant that it may well have been more difficult to escape a conviction. Not

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[246] See chapter 3.14

[247] [1924] 1 KB 461 *where the court held that banking information should be defined in the following circumstances*

> *(a) under the compulsion of law;*
> *(b) in the public's interest*
> *(c) in the furtherance of the interests of the banker;*
> *(d) with the express or implied consent of the customer*

[248] St. Vincent, CA, Civil Appeal, No 4 of 1990, where it was held that disclosure under compulsion by law must not be frustrated by any duty of confidentiality.

[249] Section 4(1) of the Exchange of Information Act 2002 which provided that; *"If in accordance with the requirements of section 3 a Regulatory Authority is satisfied that assistance should be provided with respect to a request by a foreign regulatory authority, it may request in writing any person*

(a) to furnish it with information with respect to any matter relevant to the inquiries to which the request relates;
(b) to produce any documents relevant to the inquiries to which the request relates; or
(c) to provide it with any assistance in relation to the enquiries to which the request relates as a regulatory authority may specify."

surprisingly the legislature seemed to have got itself into a muddle when drafting the legislation did by virtue of Section 68 retain the offences under Sections 59, 60 and 61 of the PCA 1997 but repealed the remainder of the Act. It has already been shown that there is very little that the PCMLA 2001 contains that was not already provided in the PCA 1997. Why therefore did parliament choose to repeal the PCA 1997 and introduce a totally new money laundering legislation? Wouldn't it have been preferable for parliament to amend the PCA instead?

The legislative framework that was established after the blacklisting of SVG does not appear to represent any significant departure from that which was in existence before the blacklisting. Although, avenues for greater transparency have been created by the new legislation that does not necessarily mean that there is greater transparency. What is obvious is that greater powers are given to institutions to pry into the affairs of persons and businesses just on a mere 'reasonable grounds to suspect' and severe penalties are imposed on those who failed to report suspicious activities to the relevant authorities. Does SVG need to establish such laws against its own people? There is no doubting the fact that the legislative framework was not created to benefit SVG. The crime statistics do not suggest that SVG requires that level of policing of civilians. So far there is no evidence of any terrorist activities or organised crime in SVG and neither does the evidence indicate that money laundering is a problem. SVG seems to be demonstrating to the international community that it is a responsible country and that it is prepared to legislate against its peoples to mitigate the iniquitous and nefarious activities that are prevalent elsewhere.

As was stated in chapter one unemployment and poverty are at unacceptable levels and there is very little hope if any that the economic circumstances will improve in the near future. Why therefore are the institutions required to incur expenses to implement training programmes and establish reporting systems to the extent that they are required under the PCMLA 2001 and PCMLR 2001? With such a high employment level and very few viable businesses and opportunities for lucrative investments, where does SVG get the money to launder such that it requires the legislative regime that empowers people to invade the privacy of individuals? The OFSS was growing steadily before the FATF/OECD' initiatives accounted for the substantial decline in the activities within that sector. Where are the alternative economic sectors that SVG should pursue? By instituting legislative measures that will assist other countries to apprehend and bring to justice the criminal elements that reside in their countries what is the benefit to SVG? A decimated OFSS can hardly be seen as a benefit. The impact of liberalisation of trade on the bananas has been devastating for SVG and the OFSS has been experiencing significant decline. In spite of it all no country is offering an alternative.

SVG does not manufacture the guns that kill and maim and greatly assist criminal elements to exercise, fear, power and dominion over those who dare to oppose them. There is no evidence that its residents are so deeply filled with hate for mankind that they would resort to terrorist activities. There is no trading in arms and ammunitions. From all reports it seemed to have never been a threat to the peace and security of any other country let alone the world. Although there is evidence of marijuana cultivation it has not created any international outcry that requires the steadfast attention of the international community. What then was the reason for naming and shaming SVG when the evidence clearly suggested that efforts were being made legislative and otherwise to deter criminals from investing? The Former Prime Minister Sir James Mitchell during his reign retorted:

> *"...With all this talk about money laundering we should really look back on what is money laundering. It is a process of taking dirty money from drugs dealing, illegal arms dealing, illegal dealing in biological warfare and chemicals and all that kind of thing and making it clean money. You can only make it clean money by investing it somewhere that continues to earn profit. Where in the Caribbean can you really launder money of any substance?"*[250]

The current Prime Minister during the time that he was on the opposition benches responded; *'that is the point I am making.'*[251] Those two statements give a clear indication about the perspectives of the political leaders. Yet it was the current Prime Minister who introduced the new legislative framework. That the FATF/OECD's agenda is sinister is a conclusion that most small countries have accepted. Sir James seemed to have summed it up in a succinct statement when in referring to the OECD he stated; *"unto him that hath shall be given and unto him that hath not shall be taken away the little that he hath.'*[252] This was the perspective of the former Prime Minister and it would appear that it is (at least it was) also the perspective of the current Prime Minister. It is therefore interesting to see how the new money laundering regime will be implemented and administered.

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250 St. Vincent and the Grenadines Parliamentary Debate on the Proceeds of Crime (Amendment) Bill, 27th August, 1999, at p 46.
251 *Ibid*
252 Ibid at p 47.

Chap 6- "The Legal Authority Of The FATF/OECD - Issues of Sovereignty and Fairness."

6.0 *Introduction*

> *"All peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."*[1]

Many of the countries[2] that have been listed by the OECD and the FATF as uncooperative tax havens and non-cooperative countries and territories in the fight against money laundering respectively have questioned the legal authority of those organisations to take those bold steps and to go further to recommend countermeasures without compunction. Those countries not only considered the initiatives of the OECD and FATF to be nebulous and sinister, they have also argued that the initiatives were designed to and did undermine their status as sovereign States.[3] Moreover, they have also retorted that the imposition of the OECD and FATF's initiatives was arrogate.[4] In this chapter it will be argued that the OECD and FATF were not legally empowered to dictate the economic policies of SVG and that their conduct was not in conformity with international law. To support that conclusion an examination will be conducted in order to ascertain; ***(a)*** whether there was an infringement of SVG's sovereign status; ***(b)*** the legal status, if any, of both the OECD and FATF; ***(c)*** whether SVG was legally bound to comply with the FATF and OECD' initiatives; and ***(d)*** the legality of their recommended defensive actions.

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[1] General Assembly Resolution 2131(XX), UNGAOR, 20th Sess., suppl. 14(A/6220), 1965, p 11

[2] Hinterseer K., "Criminal Finance, The Political Economy of Money Laundering in a Comparative Legal Context," Kluwer Law International, 2002, at p 244, *"The initial response by the Caribbean leaders to the June 22, 2000 Report was to hold four days of talks in St. Vincent to consider a united response. Most of the Caribbean leaders who attended, viewed the June 22, 2000 Report as a fundamental threat not only to their sovereignty, but also to their economies. Sir James Mitchell, the Premier (should be Prime Minister), condemned the measures as a '...direct threat to the region's economic base and stability.' Sir Mitchell emphasised, 'We in the Caribbean do not aspire to be the refuse for drug barons and money launderers.' Rosie Douglas, the Prime Minister of Dominica, agreed, 'We will not give up our sovereign rights' although she (should be he) acknowledged that 'Some corrective measures are needed in Dominica' and that 'We know in a couple of cases there was money laundering and we can't have that.' The reaction by Caribbean leaders is understandable given reports that Monaco was omitted from the list of third category countries following lobbying by France, while Gibraltar, Guernsey, the Isle of Man were omitted following lobbying by the United Kingdom(emphasis added)."*

[3] Ibid

[4] Ibid

6.1 *Sovereignty*

6.1.1 *Territoriality principle*

SVG is a sovereign[5] State, which effectively means that it has the power *'to freely and autonomously organise itself, and to exercise a monopoly of legitimate power within its territory.'*[6] Moreover it *'has the potential, or capacity to avail itself of all the rights and to be subject to all of the duties known to the international system.'*[7] Pursuant to Article 4 of the Declaration on the Establishment of a New International Economic Order; *"Every country has a right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result.'*[8] The OFSS was one of the areas in which SVG anticipated that it would secure some economic development, and it therefore legislated accordingly.[9] It is however accepted that although being a sovereign State does not automatically permit SVG to introduce measures that harm the economic well being of another State,[10] it also does not require SVG to forego its right to self-determination and governance.[11]

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[5] Island of Palmas Case (The Netherlands v United States) 2 R.I.A.A (1928) 829 where it was stated that; *"Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State."*

[6] Qureshi A., *"International Economic Law,"* Sweet & Maxwell, 1999, at p 36: See also Article 4 of the Declaration of on the Establishment of a New Economic Order provides that;

> *"(d) Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;*
>
> *(e) Full permanent sovereignty of every State over its natural resources and all economic activities... No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right"*

[7] Dixon M & McCorquodale R, *"Cases and Materials on International Law,"* Oxford, 2003, at p 132

[8] General Assembly Resolution 3201 (S-VII), 1st May 1974, adopted without vote, UNGAOR, 6th Special Sess. Suppl. 1 (A/9559), 1974, p. 3. at p 4.

[9] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Merits, Judgement, ICJ Reports (1986), p 14, at para 202 where the court state that the principle of non-intervention *"involves the right of every Sovereign State to conduct its affairs without outside interference."*: Article 1 of the 1974 Charter of Economic Rights and Duties of States (CERDS) which provides that; *"Every State has an inalienable right to choose its economic system as well as its political, social and cultural systems in accordance the will of its people, without outside interference, coercion or threat in any form whatsoever."*

[10] Paust J., & Blaustein A., "The Arab Oil Weapon: A Reply and Reaffirmation of Illegality" 1977 at p. 144, wherein it was pointed that, "*Judge Sir Hersch Lauterpacht writes: Like independence, territorial supremacy does not give an unlimited liberty of action...A State, inspite of its own territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of a neighbouring State...A State is bound to prevent such use of its territory as having regard to the circumstances, is unduly injurious to the inhabitants of the neighbouring State...*": See also Cassese A., "International Law," at p 98.

[11] Qureshi A, "International Economic Law," 1999, at p 37

6.1.2 *Principle of non-intervention*

That each State is equal[12] and therefore one state should not intervene in the internal affairs of another State is a fundamental principle of international law.[13] Professor Warbrick described the relationship between the State and international law in the following manner:

> *"International law is mainly to do with States and, where it is to do with something else, it is because States have chosen to make it so, using their powers to bring any change about – by creating international organisations, by conferring rights and imposing duties on individuals, by acknowledging the legal character of claims of 'peoples' of self-determined units. Statehood is foundational of international law, not the other way round. States were the original and remain the primary actors in the international legal system. As the State system developed, States relied on international law for two objectives – to protect the integrity and identity of States and increasingly, to allow them to cooperate where they deemed it to be in their common interests to do so."*[14]

That statement forms the basis for the issues that will be examined and discussed in this chapter. It has made reference to the choices that can be made by States, especially when it is in their common interests so to do. But there are times when States are not free to make choices even if to do so will be in the best interest of their subjects.[15] Whereas, the power of States to bring about change is paramount to the development of all States, that power may nonetheless be used to the detriment of the economies and peoples of weaker States. This was reflected in the approach that was taken by the OECD and FATF to promote the implementation of the harmful tax and money laundering initiatives. It was evident that despite the principle of non-intervention under international law[16] which prohibited the OECD and FATF from dictating the economic policies of SVG, those organisations nevertheless, threatened and applied defensive measures that were designed to force SVG to do exactly as they demanded.[17]

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[12] Brownlie I., "Principles of Public International Law" 2003 at pp 287-289

[13] Cassese A., "International Law," at p 98.

[14] Warbrick C., "States and Recognition in International Law," Evans M, "International Law," Oxford, 2003 at p 206

[15] Ibid at p. 208

[16] United Nations Charter Art 2(7); See also Schermers H, "Different Aspects of Sovereignty," in Kreijen G., "State Sovereignty and International Governance," Oxford 2002, at p 187 where he stated that; *"Neither other States nor the United Nations have any right to intervene in matters which are essentially within the domestic jurisdiction of the State."*

[17] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Merits, Judgement, ICJ Reports (1986), p 14, at para 204 where the court state that *"intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."*

6.1.2.1 *OECD/FATF's Initiatives- Policy perspectives*

The OECD argued that SVG possessed a fiscal regime that was harmful and which eroded the tax bases of its member countries. Accordingly, it commenced a crusade to eliminate what it considered to be harmful tax practices. In this regard it stated that:

> *"To this end, the Committee will encourage non-member economies to associate themselves with the 1998 Report and to agree to its principles; and hold regional seminars that will encourage and assist non-member economies to remove features of their preferential regimes that are potentially harmful. This work programme should progress on a time table that would facilitate the removal of harmful tax practices in non-member economies by 31st December, 2005."*[18]

The FATF on the other hand after having conducted its first review of non-member countries and territories and blacklisted those that it considered to be non-cooperative issued the following statement.

> *"These jurisdictions are strongly urged to adopt measures to improve their rules and practices as expeditiously as possible in order to remedy the deficiencies identified in the reviews. Pending adoption and implementation of appropriate legislative and other measures, and in accordance with Recommendation 21, the FATF recommends that financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from the non-cooperative countries and territories mentioned in paragraph 64 and so doing take into account issues raised in the relevant summaries in Section II of the report."*[19]

Those statements encouraged member countries to infringe the principle of non-intervention under international law. It is contended that although SVG's fiscal policies may not have harmonised with the requirements of the OECD's harmful tax initiative, they were not in violation of international law; that the OECD's allegation was unjustified and that it undermined the sovereignty of SVG. It is also noteworthy to mention that the OECD never adduced any evidence that the fiscal measures that were taken by SVG actually caused any harm to the tax bases of its member Sates. Likewise, it was demonstrated in chapters 3 and 4 that the manner in which SVG was blacklisted by the FATF did not reflect the efforts made by SVG to improve its OFSS and to deal with the issue of money laundering. The OECD and the FATF appeared to have conducted their affairs as regulators of the international financial system. This raises questions about their legal authority to impose those initiatives on non-member States and whether those States are legally bound to implement the requirements of those initiatives. It is therefore contended that SVG could only have been bound by those initiatives if it; ***(a)*** entered into a treaty with the OECD and FATF ***(b)*** was estopped

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[18] OECD Report, Towards Global Tax Co-operation, Progress in identifying and Eliminating Harmful Tax Practices, 2000, p 22

[19] FATF, Review to identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2000)" at p 12

from going back on a commitment to the OECD and FATF that it made and implemented or *(c)* if the requirements of the initiatives had evolved into international customary rules.

6.2 *Legal Status of the OECD/FATF*

Before considering whether their initiatives were binding on SVG it is instructive to ascertain whether the OECD or the FATF is recognised under international law as being able to function on the international plane. In so doing it helps to clarify ***(a)*** whether SVG was required to acknowledge their existence and ***(b)*** whether the OECD, FATF or the member States should be held responsible for the conduct of the OECD and FATF. SVG may be required under international law to acknowledge the rights and obligations of the OECD or FATF if they are international organisations[20] which are endowed with international legal personality.[21] Dixon and McCorquodale described international legal personality to:

> *"...entail the ability to bring claims before international tribunals exercising an international legal jurisdiction, to enjoy rights and be subject to international legal obligations, to participate in international law creation, to enjoy the immunities attaching to international legal persons within national legal systems, to participate in international organisations and to conclude treaties."*[22]

6.2.1 *International legal personality*

Essentially, possessing 'international legal personality' creates within the international organisation a legal person under international law that is separate and distinct from its member States. Once 'international legal personality' has been established, there is a presumption that responsibility for the consequences of the harmful tax and money laundering initiatives will be attributed to the OECD or the FATF respectively.[23] On the other hand, in the absence of 'international legal personality,' responsibility for the

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[20] Akande D., "International Organizations" in Evans M, "International Law," Oxford 2003 at p 270 where it is stated that; *"In order to qualify as an international organisation an entity must be composed predominantly of States and/or other international organisations and be established under international law. International organisations are usually created by treaty but they can also be created by other means, such as resolution of another international organisation or joint unilateral acts by States."*

[21] Reparation for Injuries Suffered in the Service for the United Nations ICJ Reports (1949), p 174 at p 185: where the court stated that; *"...fifty states, representing the vast majority of the members of the international community, had the power in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personally recognised by them alone."*

[22] Dixon M & McCorquodale R, 'Cases and Materials on International Law,' 2003, at p 132

[23] Akande D., "International Organizations," in Evans M, "International Law," Oxford 2003 at p 274

consequences of those initiatives will be attributed to the member States.[24] As Cassese has observed:

> *"As for organisations that do not satisfy the ...tests, [meaning the two-fold test], it may be said that they act on behalf of all the member States. They are organs common to all those States, with the consequence that acts they perform may be legally attributable to all such States. By the same token, any wrongful act perpetrated by one of the organs or officials of the organisation is the responsibility of all the member States (my emphasis added)."*[25]

In order to attribute responsibility for the conduct of the OECD and the FATF, it seems necessary to ascertain whether they are international organisations that are endowed with international legal personality.

6.2.2 *International Organisations*

International organisations were described as *"subjects of international law which do not, unlike States possess a general competence. International organisations are governed by the 'principle of speciality,' that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrusts to them."*[26] Under international law an international organisation is said to possess legal personality if it satisfies the two stage tests that was outlined in an Advisory Opinion of the International Court of Justice (ICJ) 1949 on Reparation for Injuries Suffered in the Service of the United Nations. Firstly, it should be clear that the OECD or FATF is established with sufficient autonomy so as to discharge its functions and duties independently of its respective member States.[27] Essentially, they must be endowed *'with the competence required to enable these functions to be discharged effectively.'*[28] Secondly, that autonomy must actually be enjoyed and exercised by the OECD or FATF without any unnecessary intrusion or interference by member States. In the words of the ICJ, it is crucial that the organisation *"...is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large*

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[24] Shaw M., 'International Law' Cambridge University Press, 2003, at p. 1202 where it is stated that; *"An international organisation created by States that does not itself possess legal personality cannot be the bearer of rights or obligations separate and distinct from those of the member States. It therefore follows that such organisations cannot be interposed as between the injured third parties and the member States of that organisation."*

[25] Ibid at p 73

[26] Advisory Opinion on Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports (1996) at 78 para 25

[27] ICJ Reports (1949) at p 179 where it was stated that the organisation must be placed in *"a position in certain respects in detachment from its Members."*

[28] Ibid

measure of international personality and the capacity to operate upon an international plane."[29]

6.2.3 *Legal status of the OECD*

The OECD currently comprises 30 countries and its establishment in its current form can be traced back to 1960 with the Convention on the Organisation for Economic Cooperation and Development ('Convention') which was executed by the founding members in Paris in 1960. It was primarily established to foster closer working relationships among member countries in the development of social and economic policies.[30] SVG is not a member of the OECD.

The Articles of the Convention have clearly established the OECD as possessing 'international legal personality.' Under Article 1 of the Supplemental Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation ('Protocol 1') the legal personality of the OECD was established as follows:

> *"The Organisation shall possess juridical personality. It shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings."*

Under the Convention the Secretary General and Staff are prohibited from taking instructions from any member State or any other body for that matter, except the OECD itself.[31] This was supported by the terms of Protocol 1 which not only accorded privileges and immunities to the representatives of the OECD[32] but it also immunised the property and assets of the OECD from any interference.[33] Moreover, Article 5 of the Convention empowered the OECD to take decisions that are binding on its member States and to enter into agreements with its member States, non-members States and international organisations. On the basis of the foregoing, the OECD will encounter little difficulty, if any, in establishing that it is an international organisation and satisfying the two stage tests that are necessary to establish whether an international organisation possesses 'international legal personality.'

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[29]ICJ Reports (1949) at p 179 where it was stated that the organisation must be placed in *"a position in certain respects in detachment from its Members."*
[30] Article 1 of the 1960 of the Convention on the Organisation for Economic Cooperation and Development.
[31] Article 11 para 2
[32] Article 10
[33] Article 3

6.2.4 *Legal status of the FATF*

The FATF was established in 1989 by the G7 countries, the European Commission and eight other countries for a period of 4 years initially but which can be extended at the end of every five year period.[34] Its 40 Recommendations[35] are not binding on its member States but are seen by them as best practices in the fight against money laundering. With reference to its 40 Recommendations the FATF stated that they:

> *"...have been recognised, endorsed, or adopted by many international bodies. The Recommendations are neither complex nor difficult, nor do they compromise the freedom to engage in legitimate transactions and threaten economic development. They set out the principles for action and allow countries a measure of flexibility in implementing these principles according to their particular circumstances and constitutional frameworks. Though not binding international conventions, many countries in the world have made a political commitment to combat money laundering by implementing the Forty Recommendations."*[36]

On the basis of the foregoing the FATF is not an international organisation and is therefore devoid of 'international legal personality.'[37] There is no evidence that the founding members intended to accord an autonomous status[38] to the FATF. For example, under Article 4.1 of the 1998 Statute of the International Criminal Court the legal personality of the Court is crafted in the following manner; *'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and fulfilment of its purposes.'* Similarly, Article 1 of the 1948 OECD Protocol 1 also expressly declared the legal personality of the OECD (see above).

Even though the FATF operates a small secretariat that is located at the OECD's headquarters in Paris, it is not permanent and the organisational structure is such that there is no governing body entrusted with managerial tasks.[39] The FATF has accepted that it is an independent body and not a part of the OECD.[40] Whilst this may be the case

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[34]Gilmore W., "Dirty Money, The Evolution of Money Laundering Countermeasures," Council of Europe Publishing, 1999 at p 79 See also http:/www1.oecd.org/fatf/AboutFATF en.htm

[35] http:/www1.oecd.org/fatf/AboutFATF en.htm where it was stated that: *"The 40 Recommendations set out the framework for anti-money laundering efforts and are designed for universal application. They provide a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international cooperation."*

[36] http://www1.oecd/fatf/AboutFATF en.htm

[37]Dixon M & McCorquodale R, Cases and Materials on International Law, 2003, at p 132: see also Cassese A., "International Law" 2003 at p 72 where he stated that "*...not all international organisations possess international legal personality.*"

[38] ICJ Reports (1949) at p 179

[39] http:/www1.oecd.org/fatf/AboutFATF en.htm

[40] Ibid

in form it seems not to hold true in substance since the member States of the OECD are the same as those of the FATF.[41] The FATF was also referred to as an *'ad hoc grouping of governments and others with a complex single agenda.'*[42] Moreover, the Head of the Financial Affairs Division of the OECD indicated that the FATF; *'... is not a permanent international organisation nor a body managing a legally binding convention.'*[43] Interestingly, the FATF by its own admission accepted that it *'does not have a tightly defined constitution'* and that its 40 Recommendations are "*not a binding international convention*."[44] Accordingly, there is no constitutional document evidencing affirmation by the members of the FATF that they intended it to have legal status and its ad hoc organisational structure further supports the contention that there is no evidence of detachment from its member states.[45]

Unlike the OECD, the FATF does not have the power to conclude agreements on behalf of its member States. It is not endowed with privileges and immunities for its property,[46] assets or staff to ensure that it functions effectively. Moreover, the members of staff are not answerable solely to the FATF and neither is there any evidence that they are free from interference from member States. There seems to be little doubt, if any, that the FATF will not be able to satisfy the two-fold test and consequently will not be considered as possessing any legal personality under international law. In the absence of such status, it does not possess the *'international rights and obligations deriving from international customary rules'*[47] to which Cassese referred. Having established that the OECD possesses but the FATF is devoid of 'international legal personality' and the implications thereof, attention will now be drawn to the circumstances under which SVG could have been bound by their initiatives.

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[41] Stessen G., "The FATF 'Blacklist' Of Non-Cooperative Countries or Territories" Leiden Journal of International Law 199-208 (2001) at p. 205

[42] Gilmore W., Dirty Money, The Evolution of Money Laundering Countermeasures, at p 82

[43] http:/www1.oecd.org/fatf/AboutFATF en.htm

[44] Ibid

[45] Reparation for Injuries, Advisory Opinion, ICJ Reports at p 17: See also Cassese Antonio, International Law, at p 73

[46] Akande D., International Organizations in Evans M, International Law, Oxford, 2003 at p 273

[47] Cassese A., "International Law," 2003 at p 73-74 for example, "*(a) the right to enter into international agreement with non-member States, (b) the right to immunity from jurisdiction of State courts (c) the right to protection for all the organisation's agents acting in the territory of a third State in the official capacity as an international civil servant and (d) the right to bring an international claim with a view to obtaining reparation for any damaged caused... to the assets of the organisation or to its officials acting on behalf of the organisation.*"

6.3 *Treaty*

According to White and Abass; *'Traditionally, States co-exist in a legal system that is essentially consensual. States, no matter their disparities in size or strength, are sovereign and equal. Obligations are accepted by States either in treaty or custom by consent, they are not imposed by any higher authority.'*[48] There was no treaty[49] or agreement between the OECD and SVG which conferred powers on the OECD to dictate the fiscal policies of SVG and neither did SVG consent to the OECD's conduct of attempting to dictate its economic policies. Further, the FATF being devoid of international legal personality could not have entered into treaties on behalf of its member States. Therefore, no treaty could have existed between SVG and the FATF and there was no agreement that authorised the FATF to demand of SVG the implementation of a certain regulatory and supervisory framework for SVG's financial services sector. In the absence of a treaty no obligations or entitlements were imposed on SVG by the initiatives of the OECD and FATF. Support for this perspective can be found in the decision of the Permanent Court of International Justice (PCIJ) where it was stated that, *'a treaty only creates law as between States which are parties to it.'*[50] Moreover Articles 35[51] and 36[52] of the 1969 Vienna Convention of the Law of Treaties provide that third States are only bound by the terms of a treaty if they consented to the rights and obligations that were created by it. There is no evidence that SVG, for the purposes of the tax and money laundering initiatives consented to the rights and obligations of the agreement which created the OECD and FATF and therefore it could not have been bound to confirm to those initiatives.

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[48] White N.D & Abass A, Countermeasures and Sanctions in Evans M, International Law, Oxford, 2003 at p 505

[49] Article 2(1)(a) of the 1969 Vienna Convention of the Law of Treaties defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

[50] Certain German Interests in Poland Upper Silesia(Merits) PCIJ (1926) Ser A. no. 7, at p 29

[51] Article 35 of the 1969 Vienna Convention of the Law of Treaties provides that: *"an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."*

[52] Article 36 of the 1969 Vienna Convention of the Law of Treaties provides that;

1. *"A right arises for a third State from a provision of a treaty if the parties to a treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.*
2. *A State exercising the right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."*

6.4 *Estoppel*

Turning to the issue of estoppel, the OECD and the FATF will encounter insurmountable difficulties if they were to contend that SVG had acquiesced to the initiatives and therefore should not be allowed to challenge them.[53] Professor Ian Brownlie has stated that, *'estoppel is a general principle under international law resting on principles of good faith and consistency.*[54] In stipulating the essential elements that should be established in order to ascertain whether an estoppel has been consummated, he adopted Professor Bowett's three characteristics of an estoppel which are as follows; *"(a) a statement of fact which is clear and unambiguous (b) this statement must be voluntary, unconditional and authorised and; (c) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."*[55]

There is no evidence that any statement was made by SVG to the OECD and FATF agreeing to their initiatives. To the contrary, SVG's position on the OECD's harmful tax initiative was reflected in its response which was unequivocal. It stated that:

> *"At the outset, we are making it abundantly clear, that we are not in support of, nor in agreement with, the contents of the Report, because we do not believe that our fiscal incentive schemes can have the effect of eroding the tax base of OECD countries and undermine the fairness, neutrality and broad social acceptance of tax systems generally."*[56]

The only evidence that SVG was prepared to conform to the OECD's initiative was contained in a letter of commitment to the OECD which is dated 26th February, 2002. In that letter SVG stated that it was committed to 'the principles of the effective exchange of tax information in tax matters and transparency.' Accordingly, SVG promised to exchange information on criminal tax matters from 1st January, 2004 and on civil tax matters by 1st January, 2006. But the manner in which the commitment was given does not accord with the essential elements that are fundamental to the creation of an estoppel. The commitment was conditional. One of the conditions included the removal of SVG from the OECD' list of uncooperative tax havens, together with the lifting of any defensive measures against SVG. The other conditions required SVG to

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[53] Shaw M., "International Law" Cambridge 5th edn. 2003 at p 96
[54] Brownlie I., "Principles of Public International Law" Oxford, 6th edn. 2003 at p 616.: See also AMCO v Republic of Indonesia 89 ILR , pp 364, 504
[55] Ibid at p 615
[56] Statement by the St. Vincent and the Grenadines Delegation in Response to the Report, Harmful Tax Competition an Emerging Global Issue 31st August, 1999 p 8

participate as an equal partner in the creation of internationally accepted standards and in that regard to ensure that in so doing there is in existence a level playing field.

SVG was clearly afraid that prolonged defensive measures would have an adverse impact on its economy. Moreover, the OECD did not adduce any evidence that its reliance on SVG's compliance was detrimental to its interests. Therefore, it cannot be said that the commitment was made unconditionally and voluntarily and that there was detrimental reliance. Moreover, the letter was written almost two years after SVG was listed as an Uncooperative Tax Haven. In the absence of any commitment given in the past there could not have been a detrimental reliance since there was no statement on which to rely. Interestingly, the OECD will also encounter further difficulties contending that the letter of commitment establishes the foundation on which an estoppel has been created to prevent SVG from challenging its initiative in the future. Accordingly, there is no basis on which an argument in favour of estoppel[57] can be successfully proffered. Therefore, SVG not being a member of the OECD or FATF could only have been under an obligation to conform to those initiatives if they were generally recognised as international customary rules.[58]

6.5 *International Customs*

The practices which arose out of the OECD and FATF's initiatives could have been part of international law if they had evolved into international customary rules. Those rules have the effect of binding States within the international community.[59] But they could only have so evolved if they *'amounted to a settled practice'*[60] and *opinio juris sive necessitatis*[61] could have been inferred from the conduct of States.[62] International customary rules were defined *'as evidence of general practice accepted as law.'*[63]

[57] Garner B., "Black's Law Dictionary-Abridged," 7 edn. 2000 West Group at p 452 defines estoppel as *"A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."*

[58] Article 38 of the 1969 Vienna Convention of the Law of Treaties provides that a rule in a treaty may become binding on non-parties if it becomes a part of international custom.

[59] Cassese A., "International Law," Oxford, 2003 at p 119.

[60] Nicaragua v United States (Military and Paramilitary Activities in and Against Nicaragua Case ICJ Report (1986) 14, paras 108-109 where the court stated that: "In considering the instances of the conduct above described, the court has to emphasise that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the Acts concerned 'amount to a settled practice,' but they must be accompanied by the *opinion juris sive necessitatis.*

[61] Cassese A., "International Law" 2003 at p. 119 refers to 'opinio juris sive necessitates "... *law (opinio juris) or is required by social, economic, or political exigencies (opinio necessitatis).*"

[62] Higgins R., "Problems and Process, International Law and How We Use It," Clarendon Press, Oxford, 2001 at pg 18

[63] Article 38 of the Statute of the International Court of Justice

Essentially, those practices must be accompanied by a general acknowledgement by States[64] as being obligatory. But practice on its own is not sufficient to establish an international customary rule. Accompanying such practices must be evidence that States are willing to be bound by the practice as a legal obligation.[65] This evidence is also referred to as *opinion juris sive necessitatis*. Byers described *opinio juris sive necessitatis* as representing *'a diffuse consensus, a general set of shared understandings among States as to the legal relevance of different kinds of behaviour in different situations. In short, only that behaviour which is considered legally relevant is regarded as capable of contributing to the process of customary international law.*[66] Therefore, in determining whether or not the practices that were recommended by the OECD and FATF carried with them legal obligations the behaviour of States towards those practices is of significance.

Under international law there appears to be two approaches to the evolution of customary rules. The first being that implicit in the generally recognised practice is *opinio juris sive necessitates,* which effectively requires no further attempt to ascertain *opinio juris* in order to maintain that a *'settled practice'* had evolved into an international customary rule.[67] Essentially, engaging in the *'settled practice'* is in itself a demonstration that States are willing to be bound by the practice. The second approach favours a dichotomous assessment of the existence of an international customary rule.[68] With this approach the *'settled practice'* is distinguished from the *opinio juris sive necessitatis* because recognition is given to the fact that implementing a practice that is generally followed is not by itself sufficient evidence that those following the practice considered it to be binding or even intended to be bound by it. Cases such as the **Lotus**[69] and the **Northern Sea Continental Shelf**[70] have strongly favoured the dichotomous assessment to the establishment of an international customary rule. In the **North Sea Continental Shelf Cases** the ICJ stated that:

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[64] Fisheries Case ICJ Reports (1951), 191, where customary international law was defined as the generalisation of the practice of States
[65] Higgins R., "Problems and Process, International Law and How We Use It," 2001 at pp 18-19
[66] Byers M., "Custom, Power and the Power of Rules," Cambridge, 1999, at p 19
[67] Ibid at p 130
[68] Ibid at p 130
[69] PCIJ Ser A, No.10, (1927) p. 28 *"Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice , abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand... there are other circumstances calculated to show that the contrary is true."*
[70] ICJ Report (1969) 3, at para 77

"The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinion juris; for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such , or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty..."[71]

This approach was further amplified in the case of **Nicaragua v USA (Merits)**.[72] Therefore, the initiatives of the OECD and FATF could only have been binding on SVG if two important conditions were satisfied. Firstly, it must be shown that the initiatives *'amounted to a settled practice.'* Secondly, there must be evidence that those States that applied the initiatives considered them to be legally binding (*opinion juris sive necessitatis*). For the purposes of this chapter it seems appropriate to categorise the international customary rules relating to taxation under three headings, namely, the fiscal policy principle, the discriminatory principle and the confiscatory principle.

6.5.1 *Fiscal policy principle*

Under the fiscal policy principle every state has a wide discretion to regulate its fiscal policies in the most appropriate manner in order to meet its political, social, economic and cultural needs. In the **Lotus Case** the PCIJ held that;

"Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards best and most suitable."[73]

[71] ICJ Reports (1969) ,3 at para 77

[72] ICJ Reports (1986) 14 paras 108-109 where it was stated that; *"In considering the instances of the conduct above described, the court has to emphasise that, as was observed in the North Sea Continental Shelf Cases, for a new customary ruled to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the opinion juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitatis."*

[73] SS Lotus Case (France v Turkey) PCIJ Ser A (1927) No. 9

The width of the discretion is so extensive that the fiscal policies may even undermine the economy of another State.[74] Essentially, every State must be free to choose and implement its fiscal policies without any restriction being imposed upon it by another State.[75] Any such restriction is considered to be wrongful and the more serious the restriction the more likely that it will be perceived as an unlawful intervention.[76] However, the width of the discretion may have its limitations in that a State is prohibited from enforcing its rules and decisions within the territory of another State without the consent of that State.[77]

6.5.2 *Discriminatory principle*

Equally the discriminatory principle prohibits a tax regime which discriminates on the basis of race although such a prohibition should be applied cautiously. Beveridge questioned the generality of the prohibition in the following manner;

> *"...it is insufficient to speak of a general principle of non-discrimination on the grounds of race, without further investigating whether the acts complained of are justified in the circumstances; 'whether a particular differentiation of aliens and nationals has a reasonable bases in the community interest of the larger community must...depend not only upon the value primarily at stake in the differentiation but also upon many particular, and varying features of the context in which the differentiation is made.'"*[78]

On the basis of that statement it would appear that because evidence can be adduced to justify the discrimination or to prove otherwise, the prohibition on race may not be entirely absolute. Nonetheless, it was held to be a rule of *jus cogens* in the **Barcelona Traction Case.**[79]

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[74] Beveridge Fiona, "The Treatment and Taxation of Foreign Investment Under International Law, Towards International Discipline." Melland Schill Studies in International Law, 2000 at p. 76

[75] SS Lotus Case (France v Turkey) PCIJ Ser A (1927) No. 9 where it was stated that: *"International law governs international relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."*

[76] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports (1986), p. 14 at para 204 where the court held that; *"...intervention is wrongful when it uses methods of coercion in regards to such choices, which must remain free ones."*

[77] SS Lotus Case (France v Turkey) PCIJ Ser A (1927) No. 9: See also

[78] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law, Towards International Discipline." 2000 at p. 11

[79] Barcelona Traction Case(Second Phase), ICJ Reports (1970), 3 at 32 where in reference to states' obligation to the international community as a whole the court stated that; *"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."*

6.5.3 *Confiscatory principle*

The confiscatory principle also prohibits the expropriation of property of aliens without prompt, adequate and effective compensation.[80] It is accepted that States as a matter of public policy or expediency may need to acquire the property of a foreign investor and may expropriate it accordingly. In those circumstances the State has an obligation under international customary rules to adequately compensate the investor expeditiously.

6.5.4 *OECD's Proposed International Tax principles*

The OECD has not contended that SVG, by its conduct, acted inconsistently with the fiscal policy principle, the discriminatory principle or the confiscatory principle. Those are the principles that are derived from international customary rules and which are relevant under international law to the OECD's initiative. The OECD nonetheless and with some clarity has contended that jurisdictions which possess ***(a)*** a low or no tax regime ***(b)*** tax regimes that do not permit the effective exchange of tax information ***(c)*** tax regimes that lack transparency and; ***(d)*** a financial services structure that is indifferent as to whether foreign owned entities establish a substantial presence or prohibits foreign owned entities from having any commercial impact on the economy are eroding the tax bases and harming the economies of OECD member States.

It has already been mentioned above that every country has a wide discretion to arrange its fiscal affairs in a manner that is most appropriate to its social, political, cultural and economic needs. Accordingly, any restriction of such a discretion by way of coercion will be considered as wrongful and amounts to an unlawful intervention. Therefore, SVG, by pursuing a no tax policy in the OFSS financial services sector, even though it may not have been considered to be transparent by the OECD, and by not mandating all offshore entities to have a substantive presence within its jurisdiction, has nonetheless, conducted its fiscal affairs in conformity with international law. With regard to the effective exchange of information, Beveridge contends that; *"Many arrangements exist for the exchange of information, but there are no customary international legal obligations to cooperate in such matters."*[81] No international obligations were therefore imposed upon SVG to engage in the exchange of tax information with the OECD. Moreover, despite the multitude of double taxation treaties it cannot be said that any customary

[80] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law, Towards International Discipline." 2000 at p. 19

[81] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law, Towards International Discipline." 2000 at pp. 76-77

international law has evolved concerning the sharing of tax information. In that regard Beveridge has observed that;

> *"...though many double taxation treaties have been concluded along the lines the OECD Model or the UN Model, thus producing patterns of similar provisions, there is no obligation to recognise the underlying practice and there are many variations within this body of practice as well as cases where such treaties have been concluded. They do not therefore add up to a body of customary international law. The absence of generally accepted obligations in the fiscal sphere underlie the Barclays Case...and is also at the root of the problems presented by tax havens."*[82]

6.5.5 *Evolution of the OECD's Proposed International Tax principles*

It may well have been as a result of the alleged problems with tax havens, to which Beveridge refers, that the OECD introduced the harmful tax initiative and attempted to enforce it without regard to issues of State sovereignty and fairness. The report on the harmful tax initiative was published in 1998 and SVG was placed on the list of uncooperative jurisdictions which was published two years later, in 2000. Could it be that the OECD concluded that between 1998 and 2000 the contents of its initiative had evolved into international customary rules that were binding on SVG and to which SVG did not conform? Can state practices evolve and crystallise into international customary rules within such a relatively short space of time? In the **South West Africa Cases** Judge Tanaka in his dissenting judgment made mention of the speed with which state practice may evolve into international customary rules when he stated that:

> *"A State, instead of pronouncing its view to a few States directly concerned has the opportunity, through the medium of organisation, to declare its position to all members of the organisation and to know immediately their reaction on the same matter. In former days, practice, repetition and opinion juris sive necessitates, which are the ingredients of customary international law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organisations is greatly facilitated and accelerated..."*[83]

Earlier in his dissenting judgment he referred to the impact of the improvement in telecommunications on the evolution of international customary rules when he acknowledged that it, *"minimised the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than 10 years."*[84] Essentially Judge Tanaka was advocating the advantages of the collective decision making process and its likely impact on the swift evolution of international customary rules. Since that judgment in

[82] Ibid p. 77
[83] South West Africa Cases ICJ Reports (1966) 248 at 291
[84] Ibid at p.177

1966 there has been a much greater improvement in modern telecommunication services[85] and an obvious procession towards the economic integration of States and harmonisation of policies.[86] Could it be that the OECD member States have followed the dicta of Judge Tanaka in the development, promotion, implementation and enforcement of its harmful tax initiative? With the rapid improvement in technology and the growing tendency towards harmonisation of policies, can the 10 years in 1966 be realistically reduced to 2 years between 1998 and 2000?[87] In the past certain practices had evolved into international customs with such alacrity that an exponent of international law referred to the process as creating an 'instant custom.'[88] Shaw has observed that;

> *"...the customary law relating to a State's sovereignty over its airspace developed very quickly in the years immediately before and during the first World War. Similarly, the principle of non-sovereignty over the space route followed by artificial satellites came into being soon after the launching of the sputniks. Bin Cheng has argued that in such circumstances repetition is not at all necessary provided the opinio juris could be clearly established. Thus 'instant' customary law is possible."* [89]

Notwithstanding the foregoing and in the context of the OECD and FATF's initiatives, the evolution of customary rules will be required to traverse the process of establishing a *'settled practice'* which must be accompanied by *opinio juris sive necessitates.* In that regard it is contended that the contents of the OECD's harmful tax initiative were not generally recognised as 'settled practice' and the response of SVG and a vast majority of States clearly demonstrated that they were not considered to be legally binding. Therefore, they could not have evolved into international customary rules.

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[85] Held D., McGrew A., Goldblatt D. & Perraton J, "Global Transformations Politics, Economics and Culture," Stanford University Press, 1999 at p. 342

[86] Beveridge F., "The Treatment and Taxation of Foreign Investment Under International Law, Towards International Discipline." 2000 at p. 51 where it was stated that; *"The modern state is generally accepted to be founded on notions of community and consent and sovereignty as arising from the consent of the community. From this consent flows the right to govern throughout the community, but within constitutional limits established by reference to that consent, albeit that these limits may be entirely notional, or perhaps, mythical."*

[87] Shaw M., 'International Law' Cambridge 5th edn. 2003 at p 74-75 *"In new areas of law, customs can be quickly established by State practices by virtue of the newness of the situations, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations."*

[88] Cheng B, "United Nations Resolutions on Outer Space, Instant International Customary Law?" IJIL, 5 (1965), 23-24 referred to in Cassese A, "International Law," 2003, at p. 120

[89] Shaw M., 'International Law' 2003 at p. 74

6.5.6 *Settled Practice or an embryonic rule?*

6.5.6.1 *The OECD*

The practices prescribed by the 1998 OECD and June 2000 FATF Reports were intended to have universal application. The OECD instructed every State to implement the Recommendations that were outlined in its 1998 Report.

SVG was not alone in its condemnation of the OECD's harmful tax initiative. Of the 47 jurisdictions[90] that were evaluated by the OECD in 1999/2000, 35 were listed[91] in the June 2000 Report[92] as Uncooperative Tax Havens. Accordingly, the OECD recommended that its member countries should take 'defensive action'[93] against the listed countries. It is noteworthy to mention that neither Switzerland nor Luxembourg which vehemently opposed the initiative was listed as uncooperative. Moreover, the list did not contain any of the other OECD member States despite the fact that in June 2000 it was reported that 60 harmful tax preferences[94] and in a subsequent report 200 preferential tax regimes[95] existed in OECD member territories.

Moreover, the 1998 OECD Report[96] on the harmful tax initiative did not indicate the international tax standards that should be applied by States. Instead, it outlined the determinants of a tax haven and the characteristics of a harmful tax regime.[97] This lack of clarity on the part of the harmful tax initiative was reflected in SVG's response when it stated that:

> *"Although the Report acknowledges that countries should be free to determine their own tax systems and structures, it went on to indicate that such freedom is conditional upon those countries complying with internationally acceptable standards. The Report did not however mention what those standards are, if there are any, and who will be responsible for establishing those standards."*[98]

[90] OECD Report, Towards Global Tax Co-operation, Progress in identifying and Eliminating Harmful Tax Practices, 2000, at p 10
[91] Ibid 17
[92] OECD Report, Towards Global Tax Co-operation, Progress in identifying and Eliminating Harmful Tax Practices, 2000
[93] Ibid at p 24
[94] Hay R., "OFCs: "The Supranational Initiatives," Private Client Business, 2001, 2, 75-91 at p. 84
[95] Ibid
[96] OECD Report on Harmful Tax Competition An Emerging Global Issue, 1998
[97] OECD Report on Harmful Tax Competition An Emerging Global Issue, 1998 at pp 19-28
[98] Statement by the St. Vincent and the Grenadines Delegation in Response to the Report, Harmful Tax Competition an Emerging Global Issue 31st August, 1999 p 22

Could it be that those standards related to the factors that the OECD considered as demonstrating a country's unwillingness to cooperate in removing harmful tax competition? If so, was the OECD calling on all countries that traditionally or otherwise pursue a low or no tax policy to impose a tax or a higher rate of tax as the case may be? What rate of tax should those countries impose and for what reason should they impose taxes? Was it referring to the factors that should be considered in identifying a tax haven, such as, lack of an effective exchange of information mechanism, lack of transparency and lack of substantial activity? Whatever the standards to which the OECD refers, the mere fact that its initiative was directed against competition[99] redound against the existence of any general practice. It is therefore difficult to see how in the absence of an agreement by States generally that those factors could have been transformed into generally recognised practices which became binding on non-member States, especially when the low or no tax factor in particular, is so germane to the economic and social well being of a nation.

The mere fact that a majority of States did not consent to the OECD's harmful tax initiative and due to the divergence of the fiscal policies of States, which will vary according to the state of their economies, it is difficult to see how in those circumstances a generally recognised practice could have been established.[100] But does inconsistency, lack of uniformity or dissent by a relatively large number of States prevent a practice from becoming a customary rule? In that regard the ICJ in the case of **Nicaragua v United States of America** stated that:

> *"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order*

[99] OECD Report "Progress in Identifying and Elimination Harmful Tax Practices," 2000 at p. 22 where the OECD's attitude to tax competition was stated as follows; *"There is a significant risk that a failure to address these practices in parallel with the work in relation to Member countries will cause a shift of the targeted activities to economies outside the OECD area, giving them unwarranted competitive advantage and limiting the effectiveness of the whole exercise."*

[100] The Asylum Case ICJ Reports (1950), at pp 276-277 *"The party which relies on a custom...must prove that this custom is established in such a manner that it has become binding on the other party...that the rule invoked...is in accordance with a constant and uniform usage practised by the States in question, and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'*
The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law..."

> *to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attribute is to conform rather than to weaken the rule."*[101]

Although the lack of consistency or uniformity of practice may not be sufficient to deny the existence of a customary rule, that principle of international law does not apply to SVG in the instant case. There was no rule in existence to which SVG did not conform and of which the OECD was attempting to impose and enforce. Interestingly, the OECD was coercing SVG into avoiding an established rule in international law which provides that no state is bound to take notice of another State's revenue laws[102] (see chapter 4). Moreover, it was also demanding that SVG should infringe individuals' right to privacy by disclosing civil tax information to their member countries on persons in whom they were interested. By not conforming to the OECD's harmful tax initiatives SVG was in effect applying the principles of international law.

Therefore, it cannot be said that by opposing the harmful tax initiative the actions of SVG should be seen as endorsing the existence of generally recognised international practices to which it should conform. It is noteworthy that SVG' opposition to the OECD' initiative was not because it accepted that it represented international standards or practices but because SVG did not believe that: ***(a)*** the OECD was legally authorised to impose those initiatives; and ***(b)*** it had any legal basis to recommend and impose defensive measures in the way that it did. Accordingly, the OECD will encounter great difficulties to successfully contend that its initiative *'amounted to a settled practice.'* In fact the OECD's initiative was struggling to take root even within its member countries and could only have been regarded as an embryonic rule that the OECD was still battling to gain universal recognition.

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[101] Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports (1986) 14 at p 98 para 186.
[102] Homan v Johnson (1775) 1 Cowp 341 at p 343

6.5.6.2 *The FATF*

Following the pronouncement that was made by Judge Tanaka in the **South West Africa Cases**[103] the FATF although it does not possess international legal personality is nonetheless in a position to recommend and promote practices that may evolve into customary rules. The FATF considers its role to be one of a *'policy making body which works to generate the necessary political will to bring about national legislative and regulatory reforms'*[104] in the areas of money laundering and terrorist financing. It has sought to do so by ensuring that its 40 Recommendations and 25 Assessment Criteria for Non-Cooperating Countries and Territories are implemented by States universally. The issue that needs to be considered is whether those recommendations have been widely accepted as 'settled practice.'

Following the FATF's evaluation of SVG, it alleged that the regulatory and supervisory framework in SVG fell within 17 out of the 25 assessment criteria (see chapter 4). In June 2000 SVG along with 14 other countries were blacklisted as countries that were non-cooperative in the fight against money laundering. It summarised the regulatory and supervisory system in SVG as follows:

> *"St. Vincent and the Grenadines meets criteria 1-6, 10-13, 15, 16 (partially), 18 and 22-25. There are no anti-money laundering regulations or guidelines in place with respect to offshore financial institutions, and thus no customer identification or record –keeping requirements or procedures. Resources devoted to supervision are extremely limited. Licensing and registration requirements for financial institutions are rudimentary. There is no system to require reporting of suspicious transactions. IBC and trust law provisions create additional obstacles, and the Offshore Finance Authority is prohibited by law from providing international cooperation with respect to information related to an application for a license, the affairs of a licensee, or the identity of affairs of a customer of a licensee. International judicial assistance is unduly limited to situations where proceedings having been commenced against a named defendant in a foreign jurisdiction."*[105]

The accuracy of the conclusions of the FATF has already been examined and discussed in chapter 4 and no further elaboration is necessary in this regard. What is however of significance in this chapter is whether the FATF's 40 Recommendations and 25 criteria for assessing non-cooperative countries and territories[106] 'amounted to a settled practice' to which SVG did not conform. The 40 Recommendations were developed

[103] South West Africa Cases ICJ Reports (1966) 248 at 291
[104] http://www1.oecd.org/fatf/AboutFATF_en.htm
[105] FATF, Review to identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (June 22, 2000)" at p 10
[106] The 25 Assessment Criteria for Assessing Non-Cooperative Countries and Territories are just a restatement of the 40 Recommendations of the FATF. They are effectively one and the same thing in substance.

since 1990 and reviewed in 1996 and 2003.[107] During that period member States of the FATF have been subjecting themselves to peer reviews and multilateral monitoring as a means of assessing the, *'progress made by member governments in implementing the ...Recommendations.'*[108] There seems to be a strong commitment among members to implement the Recommendations. It is fair to say that among the FATF member countries the 40 Recommendations to which they have committed themselves have become a standard practice that is recognised by its members. This is reflected in the growth of its membership from 15 countries in the inception to its current membership of 33.[109]

Insofar as the 25 assessment criteria are concerned the FATF has been evaluating the legislation in non-member countries in order to ascertain whether they were adequate to combat money laundering and in particular to cooperate with other countries by the sharing of information on financial and other transactions.[110] As was stated above the legislation in SVG was considered by the FATF to be inadequate. But did SVG consider the 25 assessment criteria as a 'settled practice' to which it should conform or which it had an obligation to implement?' It is obvious that those non-member countries and territories that were blacklisted and are continued to be blacklisted[111] by the FATF do not accept the 25 assessment criteria as any 'settled practice.'[112]

The discriminatory practices of the FATF by omitting some countries from the blacklist whilst, 'naming and shaming' others do not only substantially weaken any case the FATF might have been able to proffer in support of the existence of an international custom, it appeared to have also revealed an insidious characteristic. This approach it is admitted will do very little to increase vigilance and encourage cooperation.

The legislative steps that were taken by SVG over the 12 years prior to being blacklisted were mainly to meet its obligations under the Vienna Convention and to accommodate the vicissitudes of commerce and its attendant evils, such as money laundering. Very little legislative significance was directly attached to the 40 Recommendations or the 25

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107 http://www1.oecd/fatf/AboutFatf_ en.htm
108 Ibid
109 Ibid
110 Ibid
111 FATF, Review to identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures, 2001, 2002 and 2003
112 Hinterseer K., 'Criminal Finance-The Political Economy of Money Laundering in a Comparative Legal Context,' 2002 at p. 244 ; see also note 2 above.

assessment criteria but the legislation in place reflected those requirements. As was discussed in chapters 3 and 4 it would appear that by implementing the terms of the Vienna Convention in its entirety very little else, if anything, was needed to be done to demonstrate that SVG provides adequate international co-operation in criminal matters. The FATF does not have the legal authority as was demonstrated above to dictate what laws should be legislated in SVG or any non-member country for that matter. Interestingly, as was shown above it does not even have the legal authority to do so for its own member States even where they had given commitments to implement the Recommendations.

6.5.7 *Opinio juris sive necessitatis*

As was mentioned above a practice will evolve into international customary law if the behaviour of States can be considered to be legally relevant. Byers referred to legally relevant behaviour in the following manner:

> *"In other words, States either support, are ambivalent towards, or oppose potential, emerging or existing customary rules and usually behave accordingly. Anything a State does or says, or fails to do or say, therefore has the potential to be considered legally relevant, and thus to contribute to the development, maintenance or change of a rule of customary international law."*[113]

SVG and several other non-member States[114] did not recognise the contents of the harmful tax initiative of the OECD as establishing any 'settled practice' and neither did two of its members.[115] Interestingly, the most powerful member of the OECD, the USA, publicly opposed the initiative by declaring that it contemplated the harmonisation of tax policies and frustrated competition among States (see chapter 1). Essentially, the behaviour of non-member and member States alike clearly demonstrated that the OECD's initiative was not seen as having any legal force and was therefore not binding on those States. The mere fact that the OECD had to resort to recommending defensive action against the uncooperative tax havens provided potent evidence that there was an absence of any conduct on the part of those so called uncooperative tax havens which could have been interpreted as legally relevant behaviour. Accordingly, the OECD will be hard pressed to establish that *opinio juris sive necessitatis* actually existed.

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[113] Byers M., Custom, Power and the Power of Rules, 1999, at p 19

[114] OECD Report, Towards Global Tax Co-operation, Progress in identifying and Eliminating Harmful Tax Practices, 2000, p 17, where 35 countries were listed as Uncooperative Tax Havens.

[115] Ibid at p 5 see footnote where it stated that Luxembourg and Switzerland did abstained from participating in the Harmful Tax initiative

The letter of commitment to the OECD and which was executed on 26th February, 2002 established two fundamental issues. Firstly, it clearly showed that SVG did not accept that the OECD's initiative 'amounted to a settled practice.' Secondly, SVG was exercising its sovereign rights under undue influence. Interestingly, by accepting the commitment made by SVG, the OECD was also admitting that its initiative had not established any 'settled practice.' Bearing in mind that SVG was listed as an uncooperative tax jurisdiction in June 2000 and the letter of commitment was written in February 2002, it cannot therefore be said that the OECD' initiative established any 'settled practice' prior to February 2002. It cannot also be said that any settled practice was established subsequent to February 2002. As recent as October 2003 during a meeting which was convened in Canada on Global Forum on Taxation[116] the OECD admitted that there was no level playing field existing in its harmful tax initiative.[117] Moreover, it is said to have exempted Switzerland, Austria, Luxembourg and Belgium from the sharing of *'information on savings income tax, with foreign tax collectors.'*[118]

It is also noteworthy that other countries like Hong Kong and Singapore remain outside the OECD's initiative,[119] thus exacerbating the consequences resulting from the absence of a level playing field. It has been reported that the OECD during the meeting in Canada called on non-member States to assist its efforts in pushing for a level playing field.[120] That request was yet another indication that the OECD itself did not accept that a 'settled practice' had evolved. Insofar as St. Vincent and the Grenadines is concerned its commitment was made on the basis that there should exist a level playing field[121] but that is currently not the case. Accordingly, SVG has stated that unless its conditions are met it would not honour the commitment that it made in its letter to the OECD on 26th February, 2002.[122] That statement is an unequivocal renunciation of any doubts that SVG accepted the OECD's initiative as 'settled practice' to which it is legally bound.

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[116] http://www.oecd.org

[117] The Searchlight Newspaper, "OECD Admits to Uneven Playing Field," St. Vincent and the Grenadines, vol. 9 No. 43 Friday 24th October, 2003 at p 46

[118] Ibid

[119] Ibid

[120] Ibid

[121] Hay R., "Information Exchange and The Offshore Financial Centres-Part 1, Private Client Business, 2002, 2, 88-97 at p. 95

[122] The Searchlight Newspaper, "OECD Admits to Uneven Playing Field," St. Vincent and the Grenadines, vol. 9 No. 43 Friday 24th October, 2003 at p 46

Since its first review in June 2000 when SVG and 14 other countries were blacklisted the FATF continued on an annual basis to review and blacklist countries.[123] The process of review is in itself sufficient evidence that countries do not accept the FATF's initiative as legally binding on them. Moreover, in the light of the fact that by the FATF's own admission the 40 Recommendations are not meant to be international conventions[124] and therefore are not binding on member States[125] is potent evidence that they were not intended to invoke legally relevant behaviour among member States and by logical extension non-members States as well. This does not necessarily mean that non-binding decisions cannot evolve into international customary rules.[126] However, given the absence of any generally recognised practice and the difficulties of establishing *opinio juris,* the FATF will be hard pressed to successfully contend that its money laundering initiative had crystallised into international customary rules to which SVG should have conformed. The mere fact that a country is cajoled into complying with the FATF's initiative due to fear of economic reprisals ought not to be taken as acceptance on the part of the country that it is legally required to comply or that the FATF' initiative has legal force. That conduct does not conform to the process in which customs evolve and therefore can only be attributed to the process of deliberate law making as discussed below.

6.6 *Custom or deliberate law making?*

One of the salient features that distinguish a custom from a treaty is that whereas a treaty is formulated by the deliberate actions of States to introduce rules of conduct that will benefit the well being of their peoples, a custom is considered to be *'unconscious or unintentional lawmaking.'*[127] It does not generally gain legal significance as a direct result of the process of conscious and deliberate lawmaking.[128] The OECD and FATF' initiatives both required some form of legislative reform for States to conform to their requirements. The statements made by the OECD and the FATF and the imposition of

[123] http://www1.oecd.org/fatf/AboutFATF_en.htm
[124] Ibid
[125] Ibid
[126] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO), Advisory Opinion , ICJ Reports (1996), p. 66 at para 70, where the court stated that; "*...General Assembly resolutions even if they are not binding, may sometimes have normative value. They can in certain circumstances provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.*"
[127] Cassese A., "International Law," 2003 at p 119.
[128] Ibid.

defensive measures on those who did not comply, are clear demonstrations that they were effectively requiring their initiatives to have immediate legal force. Accordingly, such approach can also be seen not as requiring the evolution or as in this case the revolution of international customary rules but the immediate introduction of international legal rules. Essentially, the OECD and FATF conducted themselves as international law making bodies with the consent of some of their member States but not that of the entire international community. Unlike the United Nations(UN) Security Council which possesses the competence to take binding decisions[129] that will affect the members of the UN,[130] binding decisions that are taken by the OECD only extend to its membership. SVG not being a member of the OECD is not obligated to conform to the OECD's initiative. Therefore, the conduct of the OECD represents a threat to the sovereignty of non-member States.

6.7 *Responses of the OECD/FATF*

Having established that the OECD and the FATF's harmful tax and money laundering initiatives respectively, do not have the force of international law, it draws into question the legality of the defensive measures that were recommended and imposed by member States of those organisations against States like SVG that were alleged to have been non-compliant. Were the defensive measures in conformity with international law? Elagab has suggested that every State has a right to adopt and institute its own economic measures and in so doing may 'sever trade relations with any other,' subject to any international obligations to the contrary.[131] The defensive measures that were taken by the OECD and FATF did not go as far as severing trade relations with SVG. Instead, they were responses to what the OECD and FATF considered to be uncooperative policies and were designed to cease when those policies were removed. But what are the countermeasures that the OECD and FATF recommended to their member States to apply against their so- called uncooperative jurisdictions?

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[129] For example, Security Council Resolution 1373 (2001) requires all States to prevent and suppress the financing of terrorism.

[130] Warbrick C., "The Jurisdiction of the Security Council: Original Intention and New World Order(s)," in Capps P., Evans M., & Konstadinidis S., "Asserting Jurisdiction-international and European Legal Perspectives." 2003 Hart Publishing, at p. 127- *"The Council, which is an organ of limited membership within the UN has the exceptional power as part of its authoritative competence to reach decisions which are binding on the whole of the membership of the UN and which take priority over their other international obligations."*

[131] Elagab O.., "The Legality of Non-Forcible Counter-Measures in International Law" Oxford, 1988 at p. 197.

6.7.1 *Measures Recommended by the OECD and FATF*

In addition to the countermeasures outlined on *figure 1* the OECD also called on member States to take a common approach in the way the defensive measures should be implemented. In that regard it suggested as follows:

> *"The Committee recommends a general framework within which Member countries can implement a common approach to restraining harmful tax competition. This framework will facilitate the ability of countries to take defensive measures swiftly and effectively against jurisdictions that persist in their harmful tax practices. Defensive measures are important so that the adverse impacts from uncooperative jurisdictions can be addressed and so that these jurisdictions do not gain a competitive advantage over cooperative jurisdictions. In the application of the co-ordinated defensive measures, no distinction shall be made between jurisdictions that are dependencies of the OECD countries and those that are not. These defensive measures will be at the discretion of countries and taken under their domestic legislation or under tax treaties. Moreover, each country may choose to enforce the defensive measures in a manner that is proportionate and prioritised according to the degree of harm that a particular jurisdiction has the potential to inflict, and taking into account the effectiveness of its existing defensive measures."*[132]

The FATF on the other hand reported that:

> *"These jurisdictions [meaning those that were blacklisted] are strongly urged to adopt measures to improve their rules and practices as expeditiously as possible in order to remedy the deficiencies identified in the reviews. Pending adoption and the implementation of appropriate legislative and other measures, and in accordance with Recommendations 21, the FATF recommends that financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from the 'non-cooperative countries and territories mentioned in paragraph 64 and so doing take into account issues raised in the relevant summaries in Section II of this report (my emphasis added)."*[133]

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[132] OECD Report, "Towards Global Tax Co-operation, Progress in identifying and Eliminating Harmful Tax Practices," 2000, p 29

[133] FATF' Report, "First Review to identify Non-Cooperative Countries or Territories," 22nd June, 2000 at p 12, para 65.

Figure 1. **The range of possible defensive measures identified to date by the OECD as a framework for a common approach with regard to Uncooperative Tax Havens as of 31 July 2001**

1. To disallow deductions, exemptions, credits, or other allowances related to transactions with Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.

2. To require comprehensive information reporting rules for transactions involving Uncooperative Tax Havens or taking advantage of their harmful tax practices, supported by substantial penalties for inaccurate reporting or non-reporting of such transactions.

3. For countries that do not have controlled foreign corporation or equivalent (CFC) rules, to consider adopting such rules, and for countries that have such rules, to ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices (Recommendation 1 of the 1998 Report).

4. To deny any exceptions *(e.g.* reasonable cause) that may otherwise apply to the application of regular penalties in the case of transactions involving entities organised in Uncooperative Tax Havens or taking advantage of their harmful tax practices.

5. To deny the availability of the foreign tax credit or the participation exemption with regard to distributions that are sourced from Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.

6. To impose withholding taxes on certain payments to residents of Uncooperative Tax Havens.

7. To enhance audit and enforcement activities with respect to Uncooperative Tax Havens and transactions taking advantage of their harmful tax practices.

8. To ensure that any existing and new domestic defensive measures against harmful tax practices are also applicable to transactions with Uncooperative Tax Havens and to transactions taking advantage of their harmful tax practices.

9. Not to enter into any comprehensive income tax conventions with Uncooperative Tax Havens, and to consider terminating any such existing conventions unless certain conditions are met (Recommendation 12 of the 1998 Report).

10. To deny deductions and cost recovery, to the extent otherwise allowable, for fees and expenses incurred in establishing or acquiring entities incorporated in Uncooperative Tax Havens.

11. To impose 'transactional' charges or levies on certain transactions involving Uncooperative Tax Havens.

The Recommendation 21 to which the FATF's statement referred provides as follows:

> *"Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations [meaning the 40 Recommendations]. Whenever these transactions have an apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies(my emphasis added)."*

In an effort to apply Recommendation 21, FINCEN of the USA' Department of Treasury issued a Financial Advisory against SVG in July 2000. The Advisory stated as follows:

> *"...the legal, supervisory, and regulatory systems of St. Vincent and the Grenadines at present create significant opportunities and tools for the laundering and protection of the proceeds of crime and allow criminals who make use of those systems to increase significantly their chances to evade effective investigation or punishment. The structural weaknesses in St. Vincent and the Grenadines' laws increase the possibility that transactions involving banks or other entities and accounts maintained in St. Vincent and the Grenadines will be used for illegal purposes. Thus, banks and other financial institutions operating in the United States should give enhanced scrutiny to any transaction originating in or routed through St. Vincent and the Grenadines, or involved entities organised or domiciled, or persons maintaining accounts, in St. Vincent and the Grenadines..."*

Moreover, the FATF made further recommendations to its members to; (a) impose customer identification obligations *"with respect to financial transactions carried out with or by individuals or legal entities whose account is in a non-cooperative jurisdiction;"*[134] (b) *"pay special attention to or to report financial transactions conducted with individuals or legal entities having their account at a financial institution established in a non-cooperative jurisdiction;"*[135] (c) condition, restrict, target or even prohibit, *"financial transactions with non-cooperative jurisdictions."*[136]

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[134] FATF' Report, "First Review to identify Non-Cooperative Countries or Territories," 14th February, 2000 at p. 7 – The Report further provided that; *"In order to make it difficult for individuals and legal entities established or registered in non-cooperative jurisdictions to enter the financial systems in FATF members, the latter should make sure that financial institutions within their jurisdiction fully satisfy the obligation to identify their clients before starting business relations. It should be forbidden to open an account if the applicant fails to supply really valid documentation enabling the financial institution to know without ambiguity the true identity of the owner/beneficial owner of such account."*

[135] Ibid – *"Additional countermeasures could consist in requiring financial institutions to pay special attention to any transaction having a link to a country or territory previously identified as non-cooperative. It could also consist in requiring financial institutions to report systematically transactions to the financial intelligence unit or any competent body above a given amount at a financial institution established in countries or territories previously identified as unco-operative. These requirements should also make it possible to step up the vigilance of financial institutions and to enrich considerably the information of/to financial intelligence units on transactions carried out with non-cooperative jurisdictions...they will put more pressure on the jurisdictions concerned, capable of convincing them to adopt necessary reforms and to co-operate better in the fight against money laundering."*

[136] Ibid- *"FATF members should also consider determining whether it is desirable and feasible to condition, restrict, target or even prohibit financial transactions with such jurisdictions. Such measures*

Additionally, the OECD and FATF's lists of uncooperative countries and territories were publicised in the international news media and via the internet as jurisdictions that were not cooperative in the fight against global crime and therefore were not considered as desirable financial services centres in which to invest. The impact of those measures on SVG was and still is detrimental and therefore required legal justification for their imposition. The question requiring further consideration is whether the defensive measures (be they economic coercion or countermeasures) taken by the OECD and FATF were in conformity with international law?

It will be argued that the defensive measures that were taken by the OECD/FATF against SVG were unlawful under international law. It will not however be contended that economic coercion is an independent wrong in international law or that all economic measures that have effects on third States are unlawful. The argument will be based on the premise that measures that are specifically directed against an individual State, especially if taken concertedly by other States, will constitute an internationally wrongful act if their effects are so severe as to impose serious economic consequences on the target State and preclude it from taking significant political decisions as the price of avoiding those consequences. It is argued that this is precisely the position of SVG as against the measures taken by the member States of the OECD/FATF.

In response to any claim that the action could be justified as countermeasures, it will be argued that SVG was not engaged in any unlawful act, which would justify any reprisal countermeasure by the OECD/FATF member States. Moreover, the argument will be buttressed with the International Law Commissions (ILC) Articles on State Responsibility as a means of contesting other aspects of a lawful countermeasure response.

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could serve as an ultimate recourse should a country or territory have decided to preserve laws and practices that are particularly damaging for the fight against money laundering. In the event that there was no legal basis for taking these measures, FATF members should consider adopting the relevant legislation. FATF members should also examine ways to prevent financial institutions located in identified non-cooperating countries or territories from using facilities (for example, information technology facilities) located in the FATF member's territory."

6.7.2 Economic Coercion

The OECD and FATF may wish to contend that their defensive measures amount to economic coercion and are therefore not inconsistent with international law.[137] Economic coercion has yet to be accorded a precise and acceptable definition[138] in international law.[139] However, it represents measures that are usually taken by States to punish or pressure[140] other States to conform to a particular political or economic agenda.[141] Although, as Elagab pointed out, there is no specific legal regime under international law that governs economic coercion, this does not necessarily mean that the imposition of economic coercion by one State against another cannot amount to a violation of international law.[142] If the effect of the economic coercion is such that it results in serious human rights implications[143] or it undermines a country's freedom to choose its economic system then such a conduct will be seen as impermissible and therefore inconsistent with the principle of non-intervention[144] under international law. Therefore, it would appear that the effect that economic coercion may have on the injured State is relevant and significant in determining the legality of its imposition and not just the mere application of economic coercion per se.

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[137] Elagab O., "The Legality of Non-Forcible –Countermeasures In International Law,"1988 at p. 212 - *"...there are no rules of international law that categorically pronounce either on the prima facie legality or prima facie illegality of economic coercion...Nevertheless, it should not therefore be assumed that the tenor of international law is to leave the category of economic coercion as such unregulated even in clear violation of established principles."*

[138] Submitted by Bolivia to the Special Committee on the Question of Defining Aggression, UN Doc A.C. 66/L.9, 15 Sept. 1953 where economic coercion was defined as: *"..unilateral action whereby a State is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is rendered unable to act in its defence or to co-operate in the collective defence of peace shall likewise be deemed to constitute an act of aggression."* Note however the criticisms of that definition by Elagab in Elagab O., "The Legality of Non-Forcible – Countermeasures In International Law,"1988 at p. 191

[139] Elagab O., "The Legality of Non-Forcible –Countermeasures In International Law,"1988 at p. 196 *"It is obvious that economic coercion is practised by virtually all States, powerful or weak. Yet economic coercion as a concept does not lend itself to a definition that is both exact and comprehensive."*

[140] White ND & Abass A,- "Countermeasures and Sanctions" in Evans M., "International Law," 2003 at p. 519 *"Powerful States do not always appear to be constrained by the niceties of the requirements of countermeasures, they do not simply suspend obligations, they do not simply seek to remedy the illegality, what they seek is coercion and punishment by the application of sanctions often of an economic nature, not countermeasures."*

[141] Ibid –where it is stated that the US unilaterally imposed sanctions against Cuba in 1960, Iran in 1979 and the Soviet Union in 1980.

[142] Elagab O., "The Legality of Non-Forcible –Countermeasures In International Law,"1988 at p. 212 - *"Individual rules of international law may be applied to determine the legality of economic conduct on a given occasion. Thus, the issue of the legality will depend on the operation of particular rules of international law in particular contexts."*

[143] See chap 6.8

[144] Ibid at pp. 212-213- *"For instance, in their protests against the sanctions imposed by the United States in connection with the Siberian gas pipeline, none of the aggrieved European Governments referred to these sanctions as 'economic coercion.' Instead, they were challenged for being inconsistent with the principle of jurisdiction."*

It is important to note that those measures are levied against persons who may not be able in any way to influence the political directorate to act in accordance with the requirements of the OECD/FATF's initiative[145] and this may have implications for employment and poverty levels.[146] Moreover, the defensive measures were implemented to restrict SVG's inalienable right to choose its own economic system,[147] and to coerce it to carry out the political will of the OECD/FATF.[148] Essentially, the defensive measures were specifically introduced to hinder the exercise of that inalienable right[149] and to punish SVG until its fiscal regime accorded with the requirements of the harmful tax initiative. In that regard Elagab pointed out;

> *"Bowett argues that measures not illegal per se may become illegal upon proof of an improper motive or purpose...He further points out that though the proposed criterion permits the protection of economic interests it does not legitimise economic coercion injurious to another State, when the motive is to further protect the State's political interests."*[150]

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[145] General Comment of the International Convention on Economic, Social and Cultural Rights (1997) 8, para 16 *"The inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of determination that their leaders have violated norms relating to international peace and security.*

[146] Article 4 of the ICESR provides that:

(1) "The States Parties to the present Covenant recognise the right of everyone to adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance on international co-operation based on free consent.

(2) The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including programmes, which are needed;

- *(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;*
- (b) *Taking into account the problems of both food-importing countries, to ensure an equitable distribution of world food supplies in relation to need."*

[147] Article 1 of the Charter of Economic Rights and Duties of States(CERDs) 1974 provides that: *"Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat whatsoever."*

[148] The main text of The Declaration On the Inadmissibility of Intervention In Domestic Affairs of States And the Protection of Their Independence And Sovereignty, 1965 provides;

"(2) No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind."

[149] Article 4(d) and (e) on the Declaration on the Establishment of a New International Economic Order provide that:

- *(d) Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;*
- (e) *Full permanent sovereignty of every State over its natural resources and all economic activities. [...] No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."*

[150] Elagab O., "The Legality of Non-Forcible –Countermeasures In International Law," 1988 at p. 195

This thesis concurs with Bowett's argument. There is no evidence that SVG caused any harm to the economic interests of the OECD/FATF member countries. Moreover, it is difficult to see how the fiscal regime of a small and impoverished country such as SVG could have adversely affected the economies of the rich and powerful States of the OECD/FATF. Accordingly, the defensive measures even if they amounted to economic coercion cannot be said to be lawful.

For small countries such as SVG those defensive measures may have devastating economic consequences. It is noticeable that the naming and shaming of SVG as an uncooperative tax haven and the issuing of threats of defensive measures have adversely affected the OFSS and the economy as a whole (see chapter 1.1.1). Even if the defensive measures are considered to be a form of economic coercion the impact that they can have on the economy of SVG will be disproportionate[151] to the purpose that they are trying to achieve and therefore may be considered to be reprisals or retorsions.[152]

Interestingly however, the developed countries were faced with a similar dilemma in 1973 when the Arab nations introduced an oil embargo and other measures[153] that were not favourable to those countries that supported Israel during the Arab, Israeli war.[154] It was then argued by the developed countries that in addition to the oil embargo and the blacklisting of Pro-Israel or Pro-Jewish business firms, the Arab nations had formed an

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[151] Paust J., & Blaustein A., "The Arab Coercion: Background" in "The Arab Oil Weapon" 1977 at p. 77 -"*...the principle of proportionality requires that the use of coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives...under the established conditions of necessity.*"

[152] White N., & Abass A., "Countermeasures and Sanctions" in Evans M., "International Law," at p. 510- "*Retorsion is conduct that does not involve the suspension of international obligations owed by the injured State to the responsible State, even though usually taken in response to unlawful acts on the part of the responsible State. Acts of retorsions may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes.*

[153] Paust J., & Blaustein A., "The Arab Coercion: Background" in "The Arab Oil Weapon" 1977 at p. 67- "*On October 18th[1973], just twelve days after the joint Arab initiation of war against Israel, Saudi Arabia, the world's largest oil-exporting State, announced immediate cuts in oil production in an attempt to pressure the united States to reduce support for the State of Israel and also threatened to cut off all oil trade with the United States, if Arab demands were not met.*"

[154] Paust J., & Blaustein A., "The Arab Oil Weapon: A Reply and Reaffirmation of Illegality" 1977 at pp. 148-149 "*Underscoring the threat of president Sadat to use Arab money as a political weapon are recent efforts to blacklist business entities of the developed countries in order to coerce those allegedly are aiding Israel. Partially blacklisted companies such as Sony and Leyland were informed that blacklisting would cease upon conclusion of pending agreements to establish operations in Arab countries.*"

oil cartel[155] and that overall the conduct of the Arab nations violated Article 2(4) of the United Nations Charter which provides that:

> *"All members should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of United Nations."*

It was further argued that the use of oil as a weapon was not in conformity with international law.[156] The OECD/FATF's initiatives appear to be similar in substance to the measures that were adopted by the Arab nations. This also raises the question as to whether the OECD/FATF member States are trying to form a cartel for the provision of financial services. If as the developed States argued during the Arab oil crisis that the conduct of the Arab nations was unlawful under international law then by extension the conduct of the OECD/FATF is also unlawful. If the OECD/FATF member countries are essentially engaged in a cartel arrangement for the provision of financial services, this may amount to a common law conspiracy[157] by the OECD/FATF member States to determine which States should and those that should not participate in the provision of financial services and this is tantamount to an unlawful intervention into the affairs of SVG.

6.7.3 *Countermeasures*

Countermeasures are non-forcible measures that are taken by an injured State against a State that is responsible for the breach of an international obligation to the injured State.[158] This does not however preclude a State that is not injured from applying countermeasures against the responsible State. Where the international obligation was

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[155] Paust J., & Blaustein A., "The Arab Oil Weapon: A Reply and Reaffirmation of Illegality" 1977 at p. 134-135

[156] Paust J., & Blaustein A., "The Arab Coercion: Background" in "The Arab Oil Weapon" 1977 at p. 85, where in. referring to the Arab oil embargo it was stated that *"These attempts to control foreign policies and conduct (international and domestic) of other States and peoples and to affect the free choice of such States and peoples through a manipulation of resources. They constitute an interference in domestic affairs and a thwarting of fundamental community policy..."* See also Paust J., & Blaustein A., "The Arab Oil Weapon: A Reply and Reaffirmation of Illegality" 1977 at p. 143; *"Thus no sovereign may use its resources in any way it wants to use them-it must not use them so as to coerce other governments and peoples in an impermissible manner. This basic limitation on resource control and use is also recognisable in the sister and customary principle that "no State has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties or persons therein..."*

[157] Smith J., "Smith and Hogan Criminal Law" 2002 at p. 386*"Conspiracy was defined at common law as an agreement to do an unlawful act or to do a lawful act by unlawful means; and the word unlawful included not only all crimes but also some torts, fraud, the corruption of public morals and the outraging of public decency whether or not the acts in question amounted to crimes..."*

[158] Gabcikovo . Nagymaras Project (Hungary/Slovakia) ICJ Reports (1997) p. 7 at p. 55 para 83, where the court held that; *"In order to be justifiable, a countermeasure must meet certain...In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State."*

owed to a group of States (e.g. OECD/FATF), including the injured State, any member State can take countermeasures for any international wrongful act to the group as a collective whole.[159] Countermeasures are required to be transient,[160]and proportionate.[161] They are supposed to terminate when the alleged breach no longer exists[162] and *'are not intended as a form of punishment.'*[163] Similarly, they should not *'relate to a number of fundamental obligations (obligations under peremptory norms, human rights obligations etc).'*[164] Another feature of countermeasures is that their implementation should be preceded by some form of dialogue between the injured State and the responsible State, with a view to requesting of the responsible State, its compliance with the obligation that it has breached and 'issue notification of the decision to take countermeasures.'[165]

The purpose of countermeasures is to induce the responsible State to comply with its international obligations.[166] But what were the international obligations that were in force at the time of the alleged breach[167] by SVG? The international obligations to which SVG is required to conform may be derived from treaty relationships, international customary rules, general principles of international law or a combination of a treaty and a unilateral act.[168] It has already been established in this chapter that the economic policies of SVG were implemented in conformity[169] with its international

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[159] Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 276 : See also ARSIWA Article 48
[160] Ibid p. 283
[161] Ibid pp. 49-50 : See also ARSIWA Article 51: Air Services Agreement of 27[th] March, 1946 (United States v France), R.I.A.A. vol. XVII (1978) 417 at p. 444, para 83 *"It is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well known rule..."*
[162] Ibid p. 301 : See also ARSIWA Article 53
[163] Ibid p. 284
[164] Ibid p. 49 : See also ARSIWA Article 50
[165] ARSIWA Article 52: Gabcikovo . Nagymaras Project (Hungary/Slovakia) ICJ Reports (1997) p. 7
[166] Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 284: See also ARSIWA Article 49(1)
[167] Island of Palmas Case (Netherlands v United States of America) R.I.A.A, vol. II (1928) 829 at p. 845 which states that: *"Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when the dispute in regard to it arises or falls to be settled."* : See also ARSIWA Article 13
[168] Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 126
[169] Elettronica Sicula S.p.A. (ELSI), I.C.J Reports (1989), 15, at p. 50 para 70: See also Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at pp. 125-126 , *"In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover many the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take."*

obligations.[170] If the OECD and the FATF are contending that their respective initiatives imposed international obligations upon the members of the international community, then such a contention (see above and chapters 1, 3 and 4) has not been made out. Moreover, they have not adduced any evidence that any injuries have been suffered by their member States. Therefore, what was the legal basis for the imposition of countermeasures?

The OECD and the FATF removed SVG from their respective lists of uncooperative countries and territories although there were minimal, if any, changes in substance from the situation that existed prior to it being blacklisted. In August 1999 and June 2000 the OECD and the FATF respectively met with SVG. But those meetings served to inform the representatives of those organisations about the regulation of the financial services system in SVG and not to have a discussion about it. SVG, it would appear, was not in support of the OECD's initiative and did not consider that its supervisory and regulatory framework was so deficient that it was inconsistent with its international obligations to cooperate with other countries on criminal matters. As SVG was not in breach of its international obligations, any discussion with the OECD and the FATF as a means of satisfying one of the conditions for the imposition of countermeasures was otiose. It therefore follows that any notification of impending countermeasures was unnecessary.

It would appear that the purpose of the defensive measures that are outlined under 6.7.1 in the foregoing is to isolate the so called uncooperative tax havens from involvement in the provision of financial and other services to and commodity trading with entities and individuals from OECD/FATF member countries, by imposing very stringent requirements on its residents who engage in commercial transactions with persons from uncooperative tax havens. Similarly, the defensive measures are also designed to penalise commercial entities from uncooperative tax havens and non-cooperative countries that trade with or provide services to residents of OECD/FATF member countries.

[170] ARSIWA Article 13

6.7.4 *Proportionality*

Even if the OECD/ FATF could have successfully contended (which does not seem likely) that SVG was in breach of its international obligations, they would be hard pressed to justify their responses on the basis of proportionality. It was stated in the **Air Services Agreement Case** that;

> *"...countermeasures must in the first instance, have some degree of equivalence with the alleged breach –this is a well known rule...It has been observed generally that judging the "proportionality" of countermeasures is not an easy task and can at best be accomplished by approximation...it is essential in a dispute to take into account not only the injuries suffered by the companies concerned but also the importance of the principle in question."*[171]

The manner in which the OECD and FATF publicised SVG as an uncooperative jurisdiction was deleterious to its OFSS in particular and the economy as a whole (see chapter 1.1.1). The opportunities that were lost to the OFSS may never be regained, especially in the light of the growing competition among countries for the provision of international financial services. This loss should have been anticipated by the OECD and FATF, not only because they were aware of the volatility of the economy of SVG but also because it would appear that their responses were intended to have that effect. SVG placed emphasis on the financial services sector because it anticipated that the future of its economy depended on it (see chapter 1.1.1). The extent of the erosion of the OFSS which was attributed to the OECD and FATF's initiatives was considered to be substantial. Accordingly, it is contended that the measures that were taken by the OECD and FATF were not proportionate and may well be categorised as punitive in character. This may also give rise to human rights implications arising out of the violation of peremptory norms (see chap 6.8 below).[172] Essentially, the defensive measures that were taken by the OECD and FATF do not appear to be in conformity with international law.[173] They were in effect defensive measures that were taken unlawfully and with a view to restricting SVG's free choice to implement economic policies for the proper sustenance of its people. That is a clear and unequivocal breach of the principle of non-intervention under international law.

[171] Air Services Agreement of 27th March, 1946 (United States v France), R.I.A.A. vol. XVII (1978) 417 at p. 444, para 83
[172] ARSIWA Article 50(1)
[173] Ibid Article 40(1)

The extent of the harm caused to the economy of SVG and the manner in which the defensive measures were implemented can be interpreted as a form of punishment for not conforming to the initiatives of the OECD and FATF. In this regard those measures can be construed as economic coercion not countermeasures. The purpose of countermeasures is not to punish States. To do so will be in violation of Article 49.[174] Although it is generally accepted that a State is free to take whatever actions it considers necessary and that restrictions on the independence of States must not be presumed[175] it is nonetheless contended that when taking those actions States should be mindful of their legal obligations under international law. In this regard Cassese stated that:

> *"If two or more States enter into an agreement providing for the impairment or restriction of the territorial integrity or political independence of legal equality of a third State, such an agreement is null and void before it is implemented. As soon as it is implemented, the States concerned incur international responsibility for breach of a fundamental rule of international law. This also holds true for the principle of non-intervention."*[176]

6.7.5 *Attribution of Responsibility*

In the light of the fact that the OECD and FATF encouraged their member States to impose the countermeasures, are they responsible for the violation of the principle of non-intervention?[177] The OECD having been endowed with 'international legal personality' is a separate legal person and will therefore be held responsible for its conduct.[178] The FATF on the other hand is not a separate legal person and therefore responsibility for its conduct will be attributed to its member States such that each State will be responsible for its own conduct.[179] This apparent total disregard for the principle of non-intervention and that of the law of the equality of States is likely to invoke an egregious example for international relations and promote delict in the interest of self, over a cohesive, symbiotic and harmonious relationship among States in the international community. The naming and shaming of SVG as an uncooperative tax haven and non-cooperative in the fight against money laundering, was unlawful. It jeopardises the already fragile condition of some small States in the interests of powerful States. It represents a movement towards an anarchic State of international nations, rather than fostering the cooperation on which successful regulation depends.

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[174] ARSIWA Article 49

[175] Lotus, (SS) Case (France v Turkey) PCIJ Ser. A (1927) No 9, Ser No 10 at p 18

[176] Cassese A., "International Law," 2003 at p 110.

[177] ARSIWA Article 1 *"Every internationally wrongful act of a State entails the international responsibility of that State."*

[178] Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 310

[179] ARSIWA Article 47(1) : See also Crawford J., "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 310

6.8 *OECD/FATF's Initiatives and International Human Rights*

Article 1 paragraph 1 of the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR) prescribes that *'all peoples have a right to self-determination'* and should therefore be allowed to freely determine, among other things, their economic development. That Article 1 should be recognised as a fundamental right was reflected in the dissenting judgment of Judge Tanaka in the **South West Africa Case** when he stated that, *'surely the law concerning the protection of human rights may be considered to belong to jus cogens.'*[180] It is not expected that States should derogate from those rights even during the time of war or other public emergency.[181] The ICESCR specifically requires States to promote and respect the right of self -determination.[182]

The fiscal measures that were introduced by SVG since 1976 (see chapter 3) and revised to sanitise the OFSS in 1997 (see chapter 3) and thereafter were designed to alleviate some of the economic difficulties that were mentioned in chapter one. The lack of and in most instances the non-existence of natural resources coupled with the size of the country have left it with very few options economically to develop its economic base (see chapter 1). It was mentioned in chapter 1 that the banana industry has been decimated due to the liberalisation of trade. Except for bananas, SVG is not a commodity producing State and by all accounts will experience a tremendous amount of difficulties sustaining that industry subsequent to December 2005 (see chapter 1.1.1). Therefore, the OFSS enabled SVG to produce a service in a market where the playing field appeared to be level, especially in an international market that favours free trade.[183] In such a market each State is encouraged to seriously develop its fields of specialisation[184] to effectively compete with each other. The OFSS not only enabled SVG to develop a field of specialisation, it also enabled it to compete[185] in the international market on a level playing field. Quite understandably its fiscal measures

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180 ICJ Reports (1966) at p 298: Shelton D., "International Law and Relative Normativity" in Evans M, "International Law," 2003 at p 150
"The theory of *jus cogens* or peremptory norms posits that there are rules from which no derogation is permitted and which can be amended only by a few general norm of international law of the same value."
181 Advisory Opinion on Western Sahara, ICJ Reports (1975), 12 at p 31
182 Art. 1 para 3 ICESCR provides that: *"The States Parties to the Present Convention, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."*
183 Trebilcock M., Howse R., "The Regulation of International Trade," Routeledge, 2001, pp 5-6
184 Held D., McGrew A., Goldblatt D., Perraton J., "Global Transformation," 1999 at pp 164-165
185 Trebilcock M., Howse R., "The Regulation of International Trade," Routeledge, 2001, pp 481-483

were supportive in that regard. Any practice that is aimed at or appear to be aimed at destabilising the OFSS is not only adversely affecting that sector but is also undermining SVG's right to self-determination[186] and by extension seriously eroding its humanitarian efforts. In that regard the OECD and the FATF member States appeared to have ignored their obligation under Article 1 paragraph 2 of the ICESCR.[187]

Moreover internal self-determination is accepted as a fundamental right. In the matter **Reference re Secession of Quebec** the Supreme Court of Canada stated that internal self-determination includes the *'pursuit of its political economic and cultural development within the framework of an existing State.'*[188] Article 1 when taken in totality possesses a peremptory character[189] from which States are not required to derogate.[190] In this regard the countermeasures taken by the OECD and FATF are not in conformity with the legal regime that regulates them.[191] Accordingly, they appeared to have infringed the human rights of the people of SVG.[192]

The OECD will also be ignoring its responsibilities under Article 1 of the 1960 OECD Convention which requires it to contribute to sound economic expansion in member and non-member countries, and to the expansion of world trade on a non-discriminatory basis and in accordance with its international obligations. This includes encouraging greater competition. It is however noteworthy that the Treaty of Rome which established the European Economic Community was the first international agreement to

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[186] Cassese A., "International Law," 2003 at p 105 where " *...self-determination meant that peoples and nations were to have a say in international dealings: sovereign powers could no longer freely dispose of them, for example by ceding or annexing territories without paying any regard to the wishes of the population of the populations concerned, through plebiscites or referendums. Peoples were also to have a say in the conduct of domestic and foreign business; self determination was advocated as a democratic principle calling for the consent of the governed in any sovereign State; the people should always have the right freely to choose their own rulers. Furthermore, peoples and nations were entitled to be free from any external pressure, chiefly in the form of colonial rule.* "

[187] Art. 1 para 2 of the ICESCR provides as follows: *"All peoples may, for their own needs, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."*

[188] http://www.lexum.unmontreal.ca//csc-scc/en/pub/1998/vol2/html/1998/scr2-0217.html, para 126

[189] Article 53 of the 1969 Vienna Convention on the Law of Treaties refers to a peremptory norm as one which is *"accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*

[190] Cassese A., "International Law," 2003 at p 111

[191] Crawford James "The International Law Commission's Articles on State Responsibility, Introduction Text and Commentaries," 2002 at p. 50 : See ARSIWA Article 50(1)

[192] General Comment of the International Convention on Economic, Social and Cultural Rights (1997) 8, para 16 *"The inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of determination that their leaders have violated norms relating to international peace and security.*

promote free trade in goods and services.[193] Given that 20 of the 30 members States of the OECD are based in Europe and the OECD pursuant to Article 1 of its Convention is required to encourage competition among trading partners, the harmful tax initiative represents a most unfortunate contradiction of the pillars upon which the OECD and the European Union were founded.

The ICJ has held that the right to self-determination is a legal principle[194] and not merely a political slogan. Accordingly, SVG has a cogent argument against the implementation of a practice that will not merely contravene the principle of non-intervention under international law but one that will further erode its own economic base, augment the current high unemployment level and significantly contribute to the rising level of poverty. This is not what was anticipated by Article 11 of the ICESCR which seeks to impose a responsibility on States to provide for their peoples an adequate standard of living, and by extension, a right to life pursuant to Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

6.9 *Roles of WTO, United Nations and the IMF*

6.9.1 *WTO*

The WTO is already responsible for promulgating and regulating the liberalisation of world trade in goods and services.[195] It has a dispute resolution mechanism[196] that

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[193] Lowenfeld A., "International Economic Law," Oxford, 2003, at p 112

[194] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) ICJ Reports (1971) 16 at p 31; See also Advisory Opinion on Western Sahara, ICJ Reports (1975), 12 at pp 31-33

[195] The preamble to the GATT is concerned with the raising of living standards in its Member States to this end it encourages them to achieve this goal by entering into; 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade, and to the elimination of discriminatory treatment in international commerce. That the WTO is a continuation of the GATT was exemplified in Article XVI(1) of the Marrakesh Agreement Establishing the WTO which provides that; 'Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947. See Lowenfeld A., "International Economic Law," 2003, at p 69.

[196] The dispute resolution mechanism is the process through which disputes that are brought before the WTO are settled. The Dispute Settlement Understanding is administered by the Dispute Settlement Body whose main tasks are to provide the panels that are hear the disputes and to implement the rulings and recommendations of the panels. The members of the panel are chosen by the Director General of the WTO and the countries that are parties to the dispute. Having received written and oral submissions from the parties concerned, the panel then circulates a draft report of its findings and subsequently an interim report to the parties concerned for their comments. The final report which contains the panel's decision and recommendations is then submitted to the Dispute Settlement Body and the parties concerned. Any of

effectively enables its member States to bring claims about States that have by their conduct violated the rules of fair trade. The General Agreement in Trades and Services (GATS) is a regulatory mechanism for the conduct of trade in services.[197] Under the GATS member States are required to promote by their conduct the liberalisation of trade in services.[198] They, with a few exceptions[199] are not required to trade in services on more favourable terms with one country than another (otherwise referred to as the Most Favoured Nation (MFN) rule).[200]

The countermeasures of the OECD do not appear to be consistent with GATS since they discriminate against some countries in favour of others. Understandably, such measures are warranted if those countries against which the defensive measures were targeted had themselves violated the terms of the GATS. But this was not the case at all with SVG. The OECD did not complain that SVG's financial services system was inconsistent with the GATS and therefore the countermeasures were not at all consistent with the principles of free trade. It would be interesting to consider the OECD's conduct in the light of the terms of the GATS to ascertain whether SVG had any recourse to the WTO' dispute resolution mechanism as a result of the OECD's probable violation of the GATS most favoured nation (MFN) rules.[201]

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the parties concerned may dispute the decision of the panel by submitting an appeal on points of law to the Appellate Body (it consists of 7 permanent members who reflect the WTO member countries – three of whom hear appeals on a rotating basis – all members serve for four years in any one term) who may uphold, modify or reverse the decisions and recommendations of the panel and submit its decisions to the Dispute Settlement Body for acceptance or rejection.

[197] The GATS structure imposes on members a dichotomy of obligations referred to as the General Obligations and Disciplines and specific commitments. The General Obligations and Disciplines covers all the services under the GATS. The specific commitments on the other hand refers to the designated services to which members States have committed themselves pursuant to Article XX of the GATS.

[198] Lowenfeld A., "International Economic Law," Oxford, 2003, at p 70

[199] Qureshi A., "International Economic Law," 1999, at p 146 where it was stated that the Most Favoured Nation (MFN) "*...is however subject to certain exceptions. For example, the m-f-n standard does not preclude members from entering into economic arrangements in which trade in services are liberalised amongst members, or to enter into labour market integration Agreements. Members may also specify m-f-n exemptions in relation to specific services. Secondly, there must be full transparency in so far as measures pertaining to services are concerned.*'

[200] Article II(1) of the GATS provide that: "*Each Member shall accord immediately and unconditionally, to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any country.*"

[201] Hay R, "Information Exchange and The Offshore Financial Services Centres Part I," Private Client Business, 2002, 2, 88-97 at p. 94.

6.9.2 *United Nations and IMF*

The United Nations with its membership of 191 countries (as of 19th November, 2003) has the responsibility of securing peace and security universally.[202] In doing so it has embarked on a number of projects which include combating crime[203] and providing for humanitarian needs globally.[204] Closely aligned with the role of the United Nations is a number of specialized agencies of which one is the International Monetary Fund (IMF). It was established *'by treaty in 1945 to help promote the health of the world economy.'*[205] The role of the IMF is stated as follows:

> *"It was established to promote international cooperation, monetary cooperation, exchange stability, and orderly exchange arrangements; to foster economic growth andhigh levels of employment; and to provide temporary financial assistance to countries to help ease balance of payment adjustments."*[206]

That role is very varied but is also significant to the economies of countries world wide The IMF attempts to achieve those purposes by conducting an annual review of the performance of its member countries and reporting on their performances.[207] If necessary, recommendations are also made for the improvement of their economies. The IMF is therefore in the position to conduct a balanced and reasoned assessment of the impact on the economy of a member country due to its exposure and vulnerability to money laundering activities. A presumption that the actions of the IMF are unfairly prejudicial to the economy of one country in favour of a group of countries is unlikely to occupy the contemplation of member countries to the same extent that it would about the OECD and FATF. Therefore, the conduct of the IMF will be viewed with much less scepticism and apprehension than the actions of the FATF and greater cooperation is more likely to ensue given the seriousness of the IMF's intervention.

The IMF launched a money laundering initiative entitled the financial stability forum (FSF). Its approach to the money laundering issue was noticeably different from that of the FATF although it recently recognised the 40 Recommendations as global anti-money laundering standards.[208] OFCs were not targeted as being solely responsible for

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[202] www.un.org
[203] Ibid
[204] Ibid
[205] www.imf.org 'What is the International Monetary Fund'
[206] Ibid, 'About the IMF' : See also Article 1 of the IMF Agreement
[207] Article IV(3) of the IMF Agreement
[208] Gilmore W., "Changes to the Global Regime," in Clark A., & Burrell P.,- "A Practitioner's Guide to International Money Laundering Law and Regulation," 2003 at p. 288.

the proliferation of money laundering activities globally.[209] Instead, the IMF sought to advise and encourage member countries to promote and implement measures that would adequately combat money laundering.[210] In that regard it categorised the financial system of its member countries into three groups.[211] Those countries that were categorised in Group III were therefore encouraged to improve their regulatory and supervisory framework.[212] Although it is arguable that the IMF's mandate permits it to take certain coercive measures[213] against those member countries whose anti-money laundering mechanisms are inadequate and therefore threaten to destabilise the economy, that was not the approach taken by the IMF. It accepted that the provision of offshore financial services was to be encouraged[214] albeit in an environment that makes it difficult for criminals to abuse the mechanisms through which those services are provided. Accordingly, the IMF in a recent report[215] has stated that it will be monitoring the activities of OFCs to ensure that they comply with *"supervisory and integrity standards."*[216] Moreover, it will be providing technical assistance to OFCs to help *"build the necessary institutional capacity for effective supervision"*[217] and the promotion of transparency.[218]

The UN over the years has been at the forefront of the war against crime. In particular it has produced numerous reports and passed a multitude of resolutions on organised crime.[219] In the light of the fact that the UN, through the Vienna Convention 1988 had commenced the fight against drug money laundering, the time is ripe for further progress to be made in its anti-money laundering efforts. Although it is heartening to see the recent anti-money laundering efforts of the UN bear fruit with the coming into force of the Convention against Transnational Organised Crime on 29th September

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209 Ali S., "Money Laundering Control in the Caribbean," Kluwer Law International, 2003, at p 263
210 Ibid
211 Ibid
212 Ibid
213 International Monetary Fund Articles of Agreement, Article XII Secs 7 & 8 where the Fund can publish report and its views to any member; Article XXVI sec 2(a) where the Fund can declare a member ineligible to use its resources where a member has failed in its obligations; Article XXVI sec 2(b) where the Fund can suspend the voting rights of a member, where the member persistently fails in its obligation; Article where a member can be made to withdraw as a member from the Fund.
214 Ali S., "Money Laundering Control in the Caribbean," Kluwer Law International, 2003, at p 263
215 IMF- Offshore Financial Centres-The Assessment Program, 31st July, 2003.
216 Ibid at pp. 16-18
217 Ibid at pp. 19-21
218 Ibid at pp. 18-19
219 Bassiouni C., & Vetere E., "Organised Crime-A compilation of UN Documents 1975-1998," Transnational Publishers Inc., 1998, For an appreciation of the work done by the UN in the fight against organised crime.

2003[220] more work needs to be done to ensure that all member countries ratify the Convention with alacrity.. It is anticipated that this approach will be more objective and also acceptable to member countries. The current FATF's anti-money laundering initiative due to the manner in which it was introduced to non-member countries and territories, created an air of scepticism which may adversely affect the effective administration of the money laundering systems in certain countries. Moreover, the IMF during its annual review of its member countries will be in a much better position to evaluate the application of the anti-money laundering mechanism and assess its impact on the economy as a whole. The superficial review conducted by the FATF and its apparent readiness to encourage its member countries to flex their muscles against the poorer and weaker States that do not appear to do exactly as they were told will do more harm than good to the universal fight against money laundering. It is therefore suggested that the UN and not the FATF should initiate measures for the alleviation or eradication of money laundering worldwide. Further, the IMF, not the FATF should conduct the evaluation of the implementation and administration of those measures. In this way it is anticipated that there will be greater participation from countries not only in legislating against money laundering but also in ensuring that the legislation is effectively administered.

The FATF with a membership base of only 33 countries[221] is likely to be perceived as an inter-governmental organisation that is prepared to circumvent international law to promote the interest of its member States to the detriment of non-members. It is therefore difficult for such an organisation to appeal to the international community even if its initiative is laudable. Recommendation 21 together with the other recommended countermeasures[222] is a clear demonstration that the FATF was aware of its unpopularity and therefore needed to place weaker countries under undue economic and other pressures in order to have its way. That recommendation should be viewed in the light of Article VIII(2) of the IMF Agreement which prohibits those member

[220] www.unodc.org/unodc/en/crime_cicp_convention.html - *"The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition of UN Member States that this is a serious and growing problem that can only be solved through close international co-operation. The Convention, concluded at the 10th session of the Ad Hoc Committee established by the General Assembly to deal with this problem, is a legally binding instrument committing States that ratify it to taking a series of measures against transnational organised crime. These include the creation of domestic criminal offences to combat the problem, and the adoption of new, sweeping frameworks for mutual legal assistance, extradition, law-enforcement cooperation and technical assistance and training."*

[221] http://www1.oecd.org/fatf/AboutFATF_en.htm

[222] See chapter 6.7

countries that have not assumed Article VIII obligations from *'imposing restrictions on the making of payment and transfers for current international transactions'* without the approval of the IMF. Current international transactions was defined by Article XXX(d) of the IMF Agreement to include:

> *"(1) all payments due in connection with foreign trade, other current businesses, including services, and normal short-term banking and credit facilities;*
> *(2) payments due as interest from loans and as net income from other investments;*
> *(3) payments of moderate amount for amortisation of loans or for depreciation of direct investments; and*
> *(4) moderate remittances for family expenses."*

Since the FATF countries have assumed their obligations under Article VIII[223] it would appear that Recommendation 21 and the advisory that was issued by FINCEN against SVG may well have been inconsistent with Article VIII(2).[224] The unduly strict scrutiny of payments and transfers on international transactions originating from and destined to SVG resulted in unnecessary delays[225] and vital loss of business. As a matter of fact the National Commercial Bank (NCB) of SVG (the largest bank in the country) lost its correspondent banking relationship with two US banks and at one point experienced tremendous difficulties obtaining correspondent banking relationship with other US banks.[226] The financial advisory that was issued by the US which may well have been partly responsible for the difficulties that were faced by the NCB was issued in July 2000 upon the blacklisting of SVG and subsisted until July, 2003 when it was lifted.

The apparent lack of concern about the adverse impact that their initiatives would have on the economy of SVG clearly exemplified the narrow perspectives of the OECD and FATF. What is required to bring about efficacy, especially in the money laundering initiative is the participation of SVG in the decision making process that led to those initiatives and a greater appreciation and concern for the well being of its peoples. These basic requirements are more readily accessible if the regulation of world trade and the monitoring of the money laundering phenomena are left to the IMF and the WTO in whom the vast majority of the countries in the world has entrusted their trading

[223] Lowenfeld A., "International Economic Law," Oxford, 2003, at pp 508-509 - for a brief history as to why some states had not previously assumed Article VIII but have since assumed such responsibility.
[224] Hay R, "Information Exchange and The Offshore Financial Services Centres Part 1," Private Client Business, 2002, 2, 88-97 at p. 94.
[225] Qureshi A., "International Economic Law," 1999, pp 143-145
[226] Mitchell L., "A World of Opportunities," The Searchlight Newspaper, St. Vincent and the Grenadines, vol. 9 No. 40 Friday 3rd October, 2003 at p 26

and financial affairs. In this regard Qureshi in emphasising the significance of liberalisation of trade as the primary purpose of the WTO enunciated that:

> *"The WTO is to ensure these primary purposes in order to facilitate in the economies of Member States higher standards of living, full employment, growing volume of real income and effective demand, and an expansion of production and trade in goods and services. These national objectives correspond to those of the International Monetary Fund (IMF)."*[227]

Essentially, by maintaining the primacy of the IMF and the WTO in the regulation of the state of the world's finances and world trade respectively, it is anticipated that there will be greater cooperation from member countries. Moreover, the cohesion that is necessary to secure peace and security and a better standard of life for everyone, will be more readily acquired from all countries. In that regard the recent developments in the anti-money laundering efforts by the IMF in the wake of the terrorists attacks against the USA on 11th September, 2001 is a welcoming sign.[228] Moreover, the FATF issued a press release on 10th September, 2002 which provided a brief outline of those developments. The press release provided as follows:

> *"With regard to the FATF's collaboration with the IMF and the World Bank, recent efforts have resulted in the FATF's endorsement of the use of a global methodology based on the FATF's 40 Recommendations and Eight Special Recommendations in conducting assessments as part of the IMF/World Bank's Financial Sector Assessment Programme (FSAP) and its Reports on Observance of Standards and Codes (ROSC). FATF also agreed to make available experts in anti-money laundering and combating terrorist financing issues from FATF and FATF- style regional bodies to IMF/World Bank led mission teams to assess compliance based on the comprehensive methodology."*[229]

6.10 *Conclusion*

The manner in which the FATF and the OECD imposed their initiatives on SVG was clearly in violation of the principle of non-intervention under international law. Their conduct could not have been justified on the basis that SVG was in breach of international customary rules since there were no such rules in existence when in June 2000 both the OECD and FATF listed SVG as an uncooperative jurisdiction. SVG in fear of being subjected to the continued difficulties associated with Recommendation 21

[227] Qureshi A., "International Economic Law," 1999, pp 143-145 at p. 238
[228] Gilmore W., "Changes to the Global Regime," in Clark A., & Burrell P.,- "A Practitioner's Guide to International Money Laundering Law and Regulation," 2003 at p. 288.
[229] Ibid

of the FATF's 40 Recommendations[230] and the defensive actions recommended by the OECD/FATF succumbed to their initiatives. Essentially, it apparently came to accepting those initiatives by undue influence rather than voluntarily accepting that it was ordinarily legally bound. Moreover, SVG not being a member of either the FATF or the OECD was not legally obligated to implement the initiatives that they developed for themselves. Equally, they were not legally empowered under international law to dictate the economic policies or the regulatory functions of SVG. However, with the IMF/World Bank adopting the FATF's 40 Recommendations as internationally accepted standards and with the entering into force of the UN Convention against Transnational and Organised Crime it will be interesting to see how fast those standards are crystallised into international customary rules.

The countermeasures that were recommended against SVG by the OECD and FATF were unlawful. They were also unjustified and aggravated an already debilitating economic situation in SVG. As a result of the threats of countermeasures and the naming and shaming of SVG certain measures were introduced that adversely impacted on the economy. This essentially restricted SVG's right to self-determination under international law. Consequent upon the initiatives of both the FATF and OECD there was a loss in revenues to the country and persons lost their jobs. Indeed those initiatives appeared to have ignored the likely humanitarian impact that they would have on the people of the country due not only to a loss of opportunity in the OFSS but also the domestic financial services sector as well.

Under the UN's ICESCR and ICCPR, every State has a right to self- determination and to introduce policies that improve the welfare of its peoples. States are required to respect those rights and to assist each other in the furtherance of policies that will achieve those goals. It has already been noted that SVG having suffered a serious decline in one of its main industries (the banana industry), due to lack of resources, has very little, if any, options for economic growth unless it was able to engage in an industry that can compete in the global market on a level playing field. Not being able to acquire the status as a producing country because of the diseconomies of scale mentioned in chapter one it turned to the financial services sector. It was anticipated that a symbiotic relationship would have been developed between SVG and the rest of the

[230] St. Vincent and the Grenadines Parliamentary Debate, Wednesday 21st November, 2001 at p 3. as per Prime Minister Dr. Ralph Gonsalves,

developing world, in that SVG would assist in the management of some of the wealth that emanated from the production sectors of those countries.[231]

That idea seemed plausible until the OECD and FATF initiatives caused investors to divert their investments from SVG. This unfortunately resulted in a loss of opportunity to develop what was turning out to be a vibrant financial services sector. Bearing in mind the high unemployment levels that are currently existing in SVG and the unacceptably high level of poverty, the initiatives of the OECD and FATF have done more harm than good to the economy. Therefore, the ICESCR and ICCPR which were introduced to assist the disadvantaged people of the world have been blatantly flaunted by the OECD and FATF under the very sinister tax and money laundering initiatives. Such a conduct invites the question, where is the fairness under international law, when a few economically powerful States can in unison unjustifiably decide amongst themselves to undermine the legitimate economic efforts of a sovereign State and knowingly place the well-being of its people and the security of that State at great risk?

The OECD and FATF being organisations that promote the interests of their member States should not be permitted to usurp or circumvent the roles of the WTO and the UN which have a wider membership of States and whose functions should be within the interest of the greater number of States. Issues relating to fair trade should be discussed and formulated within the framework of the WTO and concerns about the financial stability and peace and security of the world are within the province of the UN and its specialised agencies such as, in this case, the IMF. To allow the OECD and FATF with just a few member States to instruct non-member States how to manage their internal affairs is not only unacceptable but it is also setting a very bad precedent. One of the roles of the UN is to promote the principle of self-determination of peoples. But the manner in which the OECD and the FATF have sought to impose their initiatives on non-member States and are allowed to flout the principles of freedom of movement of services and capital is an affront to the principle of self-determination and a blatant abuse of power.

The money laundering initiative is laudable and should be pursued vigorously. The role of monitoring the global impact of money laundering is not a matter for the FATF. It is

[231] Interview with Sir James Mitchell the former Prime Minister of St. Vincent and the Grenadines, November 2003.

understandable that the member States may wish to evaluate themselves and harmonise their approaches. But the international money laundering initiative is a matter for the UN and the monitoring of that initiative falls within the auspices of the IMF. In this way there is likely to be a much greater effort by countries to fight money laundering. Approximately 191 countries will consider themselves as being part of the decision making process, determining their own destinies and acting in accordance with their own consciences and in the interests of their respective peoples. Accordingly, there will be greater participation and cooperation and the initiative will gain momentum and efficacy. If countries are encouraged to labour under the perception that the FATF's initiative is sinister and bears the hallmarks of a rejuvenated modernised form of imperialism the anti-money laundering regimes will appear to be effective but money laundering will nonetheless continue unabated. Such a state of affairs will be untenable but is very probable unless the UN and the IMF assume and maintain their rightful places and authority in the fight against international crime.

Chap 7- "A Review of the OECD/FATF's Initiatives and Their Implications."

7.0 *Introduction*

This chapter primarily provides a summary of the conclusions of each of the foregoing chapters. However, rather than merely repeating those conclusions, the purpose of this chapter is also to draw very brief conclusions on certain issues that were discussed in the previous chapters, and where appropriate, to comment upon any current developments in the harmful tax and money laundering initiatives that are relevant to this study. In the light of the fact that there is so much detail in the study, this chapter attempts to further clarify those details and to put them into a sharper perspective.

This study was undertaken in order to ascertain whether the listing of SVG by the OECD and FATF as an uncooperative jurisdiction for tax and money laundering purposes respectively, was justified or unjustified. In seeking to reach a conclusion the terms justified and unjustified were given their ordinary meanings. For example, the Oxford Reference English Dictionary[1] defines 'justify' in the following manner; (a) *"demonstrate the correctness of an act"* and; (b) *"adduce adequate grounds for conduct."* For the purposes of this study the correctness of the initiatives and the adequacy of the grounds for the OECD/FATF's conclusions about SVG's regulatory and supervisory regime were considered in the light of domestic and international legal principles. Essentially, the study considered the credibility of the initiatives and more importantly, whether the initiatives imposed upon SVG an international legal obligation to which it did not conform. It also considered whether the regulatory and supervisory regime in SVG should be considered as uncooperative within the context of established international legal principles and any United Nations declarations concerning friendly, economic and other relations with other countries. The study concludes that SVG did demonstrate within the context of international law a willingness to cooperate with other countries in the fight against international crime and by its conduct was not perpetrating a harmful tax regime but was instead pursuing a fiscal policy within the framework of the requirements of international legal principles concerning international taxation. Therefore, the blacklisting of SVG by the OECD and FATF was unjustified.

[1] 2002 at p. 768

The study also demonstrates how vulnerable small island States are to the dictates of big developed States. In particular, it shows how the preservation of international legal principles relating to non-intervention and sovereign equality can depend largely on the economic and military power of nation States as opposed to the authority of the rule of law. In essence, it appears that large developed States are not prepared to adopt, conform or act consistent with those international legal principles when to do so may not be in their best interests or if to do so does not accord with their own agendas. But as in the case of a small island State like SVG the OECD/FATF demanded that it modified its regulatory and supervisory framework even though by so doing harm was being caused to the economy of SVG. The study therefore raises questions about whether small island States that are so dependent on economic and other assistance from big developed States do possess the qualities and characteristics of a State,[2] especially when the doctrines of sovereign equality and non-intervention can be so easily flaunted against them without any apparent effective recourse to redress. As Professor Warbrick has observed:

> *"...the doctrine of sovereign equality means that as a matter of foundational principle, all States may participate in the law making processes of international law, all States may make the initial determination about whether their rights have been violated and, if so, about what action to take to restore legality, and all States will bear international responsibility for failure to comply with their international obligations. All these are formal matters. The actual capacity of a State to influence the law making process or to obtain compliance with its legal rights is in large measure proportionate to the resources available to the State."*[3]

The study shows the adverse impact that the OECD's harmful tax initiative and the FATF's money laundering initiative can have on the economies of small island OFCs in general and the economy of SVG in particular. To gain a better appreciation of the global money laundering phenomenon and the harmful tax initiative, it was important to review the origins of OFCs, the growth of OFCs and also the historical imperatives of money laundering. It was noted in chapter 1 that the inception of offshore financial services may be traced all the way back to the 19th century. However, modern day offshore financial services were developed through initiatives in certain European

[2] Article 1 of the Montevideo Convention of the Rights and Duties of States 1933 provides that: "The State as a person of international law should possess the following qualities;

(a) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with other States.

[3] Warbrick C., "States and Recognition in International Law," in Evans M., "International Law" 2003, at p. 212

countries and then transported abroad to the colonies of the New World. OFCs still exist in Europe today, with London being the biggest of them all. Switzerland and Luxembourg are also very big players in the provision of offshore financial services, specifically in the areas of private banking and mutual funds respectively. Certain States of the US, including Delaware, Nevada and Montana also provide offshore financial services. Therefore, when condemnation is made of OFCs, the small island OFCs should not be made to feel solely responsible for instituting liberal laws that attract investors. Neither should they be held or appear to be held solely responsible for the global money laundering problem. But they should nonetheless, ensure that they do not facilitate the money laundering process by making it easy for their financial services sectors to be abused by criminals. Therefore, their regulatory and supervisory regimes should adequately detect criminal activity and provide reciprocal arrangements with other countries for the apprehension and prosecution of criminals.

7.1. *The OFSS and SVG's Dilemma*

The OFSS was heralded by SVG as an important economic sector. It was being championed as the sector in which opportunities were provided for investors to maximise their wealth. It was also anticipated that the OFSS would create employment and greatly contribute to the lessening of the inequality of wealth and high levels of poverty. By their conduct and the manner in which they implemented their initiatives the OECD/FATF have ignored the economic aspirations of SVG and effectively taken away its Statehood. In essence, the OECD/FATF interfered with SVG's right to self determination[4] when they dictated to SVG the form that its economic policies should take, concerning the provision of financial services.

If the OECD/FATF's initiatives main concern was the detection and prevention of crime, the manner in which they implemented those initiatives does not appear to reflect that concern. Within the context of the economic status of SVG, the contraction of legitimate sources of employment will further augment the already high and debilitating levels of unemployment and poverty, which may in turn trigger an undesirable rise in criminal activities. Therefore, rather than the initiatives being engaged in the efficacious detection and prevention of crime in SVG they are highly

[4] Article 1of the International Convention on Economic, Social and Cultural Rights 1966: See also chapter 6.8

likely to create the conditions for the furtherance of criminal activities, since in the absence of legitimate sources of employment illegitimate sources may well be substituted in their places. Essentially, such a state of affairs will defeat the purposes for which the initiatives were apparently established in the first place.

7.2 *Views on The theory of International Co-operation*

The OECD/FATF accused small island OFCs of being responsible for the global money laundering phenomenon. In so doing they ignored the extent of their member countries' involvement in and contribution to the global money laundering process. Although they appeared to be advocating different perspectives, the OECD and FATF are nonetheless seeking to achieve the same result, i.e., the exchange of information on offshore investors and the removal of the tax advantages which accrue to persons investing in the OFSS. It is not difficult to see who would benefit and who is likely to suffer economic loss if the OECD/FATF were to achieve those objectives. SIE are so small and generate so little from their local investment opportunities that they depend largely on investors from the OECD/FATF countries to carry out investments in the OFCs in order to assist in the stimulation of economic growth.

When information about investors can be easily disclosed to the authorities of the OECD/FATF member countries this will undoubtedly create a high level of apprehension amongst investors and greatly act as a deterrent to their involvement in offshore investment products. On the other hand, there will be little, if any, need for small island OFCs to request information from OECD/FATF member countries when there are relatively few tax payers of the small island OFCs that are actually investing in OECD/FATF member countries. Notwithstanding the foregoing, there is a strong argument for international cooperation in the fight against organised criminal activities. The difficulty is finding the right balance between the disclosure of information that will assist law enforcement in the detection and prevention of crime and the preservation of investors' confidentiality and privacy. In the final analysis, if an investor does not feel comfortable that his affairs will be kept confidential he is unlikely to consider an offshore investment proposition as being desirable. This may well be the case whether or not that investor is a law abiding citizen or he is engaged in criminal activities.

The *theory of international cooperation* (a phrase which is used in this thesis to refer to the OECD/FATF's initiatives) though laudable in the circumstances may nonetheless circumvent established international legal principles relating to sovereign equality and non-intervention when it is used as a blanket application to the fiscal policies and the regulatory and supervisory regimes of other countries. It may be more acceptable to all States if the *theory of international cooperation* is established through a series of bilateral and multilateral treaty arrangements between and among countries. At least those affected by the terms of those treaties will feel part of the process of their construction, and as a matter of State responsibility, will consider those terms as imposing legally binding obligations to which they should conform. In this way the doctrine of sovereign equality as expounded above by Professor Warbrick will be emphasised since States will participate through treaty arrangements in the law making process. Similarly, the principle of non-intervention is more likely to be observed because an international legal obligation will be imposed on States to implement the terms of the treaty arrangements. Therefore, action taken by parties to the treaty to coerce the delinquent State to perform its part of the treaty obligations may not be seen as interfering into the domestic affairs of the delinquent State.

7.3 *Comments on the OECD's Harmful Tax Initiative*

The OECD accused small island OFCs of pursuing harmful tax practices which encourage the tax payers of OECD member countries to invest in those OFCs, thus eroding the tax bases of OECD member countries. Essentially, the OECD complained that small island OFCs due to their no or low tax policies and their banking secrecy and privacy laws encourage the taxpayers of OECD member countries to engage in tax avoidance and tax evasion schemes. Therefore, the funds from tax collection that would otherwise be available to OECD countries to enable them to implement certain economic projects were lost to their economies and this eroded their tax bases. Moreover, their efforts to apprehend those involved in the tax avoidance and tax evasion schemes have been significantly frustrated by the lack of transparency of offshore operations and the lack of exchange of information about their tax payers.

Whereas in principle the OECD' initiative may have some merit, in practice the argument is difficult to sustain in a globalise environment without actually infringing international legal principles concerning non-intervention and sovereign equality of States. Although it is accepted that tax evasion is illegal, tax avoidance is not illegal, and therefore should not be placed into the same category or treated similarly as tax evasion, which the OECD has in effect done. Moreover, it has been demonstrated in chapters 1 and 4 that there is a preponderance of case law in support of tax avoidance. It is also accepted that in so far as criminal matters are concerned every country should endeavour to cooperate by providing information that will lead to the apprehension and conviction of those involved in criminal activities. However, it cannot be acceptable to require another country to utilise its limited resources to diligently police every tax payer or investor in order to ascertain whether that person is involved in criminal activities. The request for information in that regard will always be seen as a 'fishing expedition' unless sufficient evidence is adduced to create the suspicion or belief that the investor is in some way involved in or about to be involved in the commission of a criminal offence.

The OECD's initiative quite understandably encountered problems from the start. Four of its member countries were and still are not in agreement with the initiative.[5] Switzerland and Luxembourg refused to participate in the process. The USA publicly condemned the initiative by expressly indicating that promoting the global harmonisation of taxation is an unacceptable concept. Moreover, research showed that 200 tax preferential regimes existed in OECD countries and 85 such regimes in its dependent or associated territories, at the time that SVG was placed on the list of uncooperative tax havens. Yet no OECD country was listed as uncooperative, thus exposing the discriminatory characteristic of the initiative. In chapters 1, 4 and 6 it was shown that the OECD's initiative was not consistent with international laws and that SVG's fiscal policy conformed to international legal principles. The OECD required of SVG the exchange of criminal and civil tax information, an adjustment to the tax rates and a convergence of the domestic and offshore financial services sectors by removing a regime which the OECD referred to as 'ring fencing.' In general, the

[5] Austria, Switzerland, Luxembourg and the USA.

OECD required greater transparency in the operations and functioning of the OFSS, with particular emphasis being placed on the disclosure of tax information.

Interestingly, it nonetheless appeared that SVG was prepared to entertain negotiations with any country on bilateral treaty arrangements concerning taxation. Support for this assumption can be gleaned from the MLAT 1998 between SVG and the USA and in which provisions were made for the exchange of criminal tax information between the two countries (see chapter 3.14). Accordingly, the OECD as a group or its member countries individually could have attempted to negotiate with SVG bilateral treaty arrangements that provided for the exchange of tax information. The OECD seemed not to be interested in that approach.

The provision of the CRPA 1996[6] that prohibited the disclosure of confidential information on tax and revenue matters accorded with established international legal principles relating to international taxation. Those principles do not impose upon a State the duty to take notice of another State's tax laws. They clearly provide for each State the latitude to introduce fiscal policies that are beneficial to its economy and peoples. The mere fact that such policies may harm another State does not in itself make them inconsistent with international law. Moreover, the OECD did not provide any indication of a tax rate that was acceptable in the circumstances. By stating that SVG was gaining an unfair tax advantage partly due to its lower tax rates, the OECD was effectively demanding that SVG should increase its tax rates to a level which was higher than it was when SVG was listed as an uncooperative tax haven. SVG has been pursuing a low tax policy as part of its economic strategy to increase the spending power of its tax payers and stimulate investment. The OECD's attack on such a policy was essentially an attack on SVG's right to self-determination. It was exerting pressure on SVG to disengage from a fiscal policy that provided for the needs of the people of SVG. No consideration was apparently given to the likely economic consequences that would have ensued as a result of the initiative. Therefore, no effort was made by the OECD to compensate SVG for the economic difficulty that it is experiencing by giving up its right to self determination in order to comply with the OECD's initiative. Essentially, the OECD's initiative went to the root of a major

[6] Section 3(3)(b)(iii) of the Confidential Relationships Preservation (International Finance Act) 1996

economic sector of SVG and interfered with its internal domestic affairs. Such a conduct cannot be said to be in conformity with international law but instead represents a contravention of the principle of non-intervention under international law.

On 18th April 2002 SVG was removed from the OECD's list of uncooperative tax havens. In order to be removed from the list SVG was only required to issue a letter of commitment to exchange criminal and civil tax information by January 2004 and January 2006 respectively. That letter was issued on 26th February, 2002. At a recent OECD meeting (held 1 and 2nd June, 2004) in Berlin the OECD extended the commitment to providing civil tax information indefinitely.[7] This in itself is cogent evidence that there were no established international standards which had evolved into international customary law and which SVG was legally obliged to follow. The OECD has effectively established itself as the tax regulator of the world and imposed its initiative on SVG regardless of its legal authority to do so. In chapter 6 it was argued that although the OECD was an international organisation endowed with international legal personality and empowered to act on behalf of its member States on the international plane, it nonetheless did not impose any legal obligation on SVG to follow its harmful tax initiative and therefore the OECD's conduct was not in conformity with international law.

7.4 *Comments on an International Tax Organisation*

Within recent times there has been a call for the establishment of an International Tax Organisation (ITO).[8] It has been proposed that this organisation would amongst other things *"engage in the surveillance of tax developments in the same way that the IMF maintains surveillance of macroeconomic policies."*[9] However, the proposed purpose of the ITO that is most relevant to small island OFCs in general and SVG in particular is the suggestion that the ITO would act as a body that would engage in negotiations with tax havens to persuade them to "desist from harmful tax competition."[10] It is nonetheless difficult to see in a globalised environment where every State is

[7] The Searchlight Newspaper, "SVG makes Changes at OECD Berlin Forum," Vol. 10, no. 24, Friday 11th June, 2004 at p. 9
[8] http://www.ub.es/obsglob/itogen2.html "An International Tax Organisation (ITO)
[9] Ibid
[10] Ibid

encouraged to become more competitive, how tax competition can be harmful. Some countries pursue a relatively high tax policy either to finance their defence or welfare programmes, whereas others may pursue a lower tax policy either because they do not finance such high defence or welfare programmes or they seek to increase the spending power of their tax payers which in turn will generate investment opportunities and stimulate economic growth.[11] The reason for the imposition or removal of tax rates is dependent on the level of economic activity that each State considers to be beneficial to its peoples. An ITO will encounter tremendous difficulties dealing with such complex and unique issues which become more complicated where, in countries like SVG, the fiscal policy may be the only economic tool available to manage their economies.

Taxation is a domestic policy that is formulated either for the purposes of stimulating economic growth or reducing the rate of consumption which may either stabilise or contract the economy.[12] It is usually implemented by the State as an economic and political strategy to improve the welfare of its people.[13] How will the ITO be able to determine what is best for the people of each State? Furthermore, what will be the basis for demanding that a country that has a no tax policy should revise its fiscal policy and introduce a tax rate that the ITO considers to be fair and not harmful? Similarly, what is a desirable tax rate? The answers to those questions are largely dependent on the status of the domestic economy of every country and the welfare of its peoples. Attempts to interfere in that regard will not be in conformity with international legal principles, unless the ITO is invited by the State through some form of arrangement to dictate the manner in which the fiscal policy is implemented or the type of fiscal policy that is desirable.

There may well be strong arguments for the establishment of an ITO but it is suggested that its role should be restricted to an advisory capacity along the lines that have been proposed. For example, for the compilation of statistics, to identify trends and problems, present reports, offer technical assistance, and provide a forum for the

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[11] Parkin M., Powell M., and Matthews K., "Economics," 2003, at p. 418
[12] Parkin M., Powell M., and Matthews K., "Economics," 2003, at p. 418
[13] Ibid

exchange of ideas and the development of norms for tax policy and administration.[14] In the light of the obvious relationship between tax and trade and due to the large membership of the WTO,[15] it may well be more acceptable to States for the ITO to be an arm of the WTO as opposed to being an OECD organisation with such limited membership. Moreover, within the context of the OECD's initiative consideration may also be given to ascertaining whether it was in fact GATS compliant.

7.5 *The FATF's Initiative its Strengths and Weaknesses*

The FATF's money laundering initiative is laudable. It represents an alternative approach to combating criminal activities, especially organised criminal activities. Within recent times (i.e. since the September 11, 2001 terrorists attacks on the USA), it has also extended its terms of reference to include the financing of terrorist activities, which is beyond the scope of this thesis. By going after the proceeds of crime, the lifeblood of organised crime (including terrorism) can be frozen, the incentive to commit crime can be mitigated and the conviction of criminals may be more easily procured. In the face of globalisation and liberal trading arrangements among countries, transnational criminal activities can be more easily facilitated. Similarly, with improved telecommunications (e.g. fax, internet, wire transfers etc.) and also the formation of regional blocs, monies can be transferred within seconds, thus making it more difficult for law enforcement officials to detect, apprehend, prosecute and convict those involved in criminal activities.

Some OFCs with liberal regulatory and supervisory regimes increase the difficulties for law enforcement by facilitating the money laundering process. The FATF argues that the banking secrecy legislation of some OFCs is too restrictive. It impedes the disclosure of information, frustrates the efforts of law enforcement and therefore creates havens through which criminals can launder the proceeds of crime. Therefore, unless those OFCs become more vigilant and transparent the efforts of law enforcement will be thwarted and money laundering will continue unabated. In essence, the money laundering initiative can only gain efficacy with the support of all countries. Therefore, the FATF targeted countries that it perceived to have liberal and

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[14] http://www.ub.es/obsglob/itogen2.html "An International Tax Organisation (*ITO*)"

[15] See chapter 6.9

inadequate laws and condemned them as uncooperative unless they amended their regulatory and supervisory framework to accord with the FATF's 40 recommendations and its 25 assessment criteria for non-cooperating countries and territories. SVG's regulatory and supervisory framework was evaluated by the FATF and found to be inadequate, thus SVG was blacklisted by the FATF as uncooperative in the fight against money laundering. But it was demonstrated in chapter 4 that the blacklisting of SVG was unreasonable, unjust and premature and the conclusions of the FATF's evaluation were for the most part erroneous and unsubstantiated.

The FATF's money laundering initiative is commendable in principle. However, it lacked credibility because of the manner in which it was implemented by the FATF. Firstly, it was developed and introduced by FATF member countries without consultation with and suggestions from non-member countries. Secondly, it was imposed on non-member countries along with threats of countermeasures if those countries did not comply. Thirdly, the evaluation process was biased in favour of its member countries and discriminatory against SVG. It must be noted that at the time that SVG was blacklisted by the FATF none of the FATF's member countries was blacklisted. In the cases of Austria and Turkey the FATF was prepared to hold discussions with them following the identification of deficiencies in their regulatory and supervisory regimes. No such dialogue was held with SVG in order to clarify and rectify any deficiencies that were identified by the FATF. It was also noted in chapter 4 that even though the evaluation of the US identified areas of concern no attempt was made by the FATF to have those concerns resolved. Moreover, in some instances the scope of the 25 assessment criteria went well beyond the 40 Recommendations and their interpretative notes.

Fourthly, the FATF's evaluation of SVG was inaccurate and inconsistent due to the fact that during the evaluation process all of the relevant legislation was not consulted by the FATF and in many respects those that were consulted were not accurately interpreted. Moreover, the FATF did not take the time to familiarise itself with the manner in which the OFSS actually functioned and therefore could not have fully appreciated the implications of the effective application of the provisions and procedures of the regulatory and supervisory regime. Incidentally, the FATF in carrying out its evaluation of SVG did not visit SVG. It would appear that the FATF had already decided to blacklist SVG and was not prepared to conduct a thorough evaluation of SVG's operations, since to do so may well have been seen by it as an exercise in futility.

Fifthly, the initiative appeared to have been designed for the purposes of punishing states with regulatory and supervisory regimes that were not considered to be consistent with it. The FATF established itself as the world's anti-money laundering regulatory body and set about its task irregardless of the effect that it had on the economies of small countries like SVG. The UN with a greater membership is much more suited to assume the functions of the anti-money laundering regulatory body with the IMF being given the responsibility to conduct the relevant evaluations of all countries. SVG is not a member of the FATF and the FATF does not possess international legal personality and therefore does not have any legal authority under international law. Accordingly, it is not cloaked with rights, immunities and duties that are accorded under international law to international organisations which possess international legal personality that may be acknowledged by SVG. Therefore, the countermeasures that were imposed by the FATF do not result in the attribution of any responsibility to the FATF for the negative and disproportionate adverse impact that they had on the OFSS of SVG. Neither was the FATF responsible for its failure to conduct itself in conformity with international law. Essentially, any responsibility arising out of its conduct is considered to be that of its member States either jointly or severally. Finally the FATF's conduct was unlawful. It was not in conformity with the principle of non-intervention since FATF was imposing on SVG an international legal obligation that it did not have the legal capacity to impose. It was essentially interfering into SVG's domestic affairs by demanding of SVG the modification of its regulatory and supervisory framework. Moreover, the imposition of countermeasures did not occasion a breach of an international obligation by SVG.[16] Accordingly, FATF's countermeasures cannot be said to be in conformity with international law.[17] It is nonetheless noteworthy that in light of the fact that the IMF/World Bank have now accepted the FATF's 40 Recommedations as internationally accepted standards and will be assessing countries on that basis, the speed with which those standards are likely to crystallise into international customary rules may be hastened considerably.

[16] See chapter 6.7
[17] Ibid

Similarly, the recent UN Convention against Transnational and Organised Crime has been formulated along the lines of the FATF's 40 Recommendations in so far as money laundering is concerned.[18] With the Convention being entered into force in September, 2003 further support is therefore given to the anti-money laundering impetus which imposes on the international community internationally accepted standards to which legally relevant behaviour should be accorded.

The FATF's initiative is further weakened by the fact that it appeared to have concentrated its efforts on small island OFCs and ignored that the criminal activities that generate the substantial proceeds which are laundered actually occur in its member countries. What is most distressing is that the foreign policies of some FATF member countries and their agencies may have condoned and encouraged criminal activities in the past, the consequences of which are still being felt today. Moreover, the majority of the money laundering activities takes place in its member countries. The placement of the majority of funds that are laundered globally originates and ends in FATF countries and the weapons that are used by criminals to perpetrate their criminal activities are mainly manufactured in FATF member countries as well. Yet in spite of it all, not one of its member countries was blacklisted in June 2000. Instead, SVG which was ranked a low to medium risk country for money laundering purposes and in which a money laundering case had never been prosecuted was actually blacklisted. The money laundering initiative would have been more credible had the FATF concentrated its efforts in reducing criminal activities including money laundering in its member countries before demanding non-member countries to accord with standards that were ignored by its own members without any reprisals. The FATF appeared to have ignored the extent to which money laundering and the criminal activities that generate the proceeds of crime actually occur in its member States and have instead held OFCs as being responsible for the global money laundering phenomenon. Unless, there is a concerted effort in the FATF member countries to sanitise the environment in those countries that actually facilitate criminal activities money laundering will continue to be a global problem.

[18] See Articles, 7, 18, 26 and 27

7.6 *SVG's Legislative Regime*

It was demonstrated in chapters 4 and 5 that prior to it being blacklisted SVG had illustrated legislatively and otherwise that it was willing to cooperate internationally in the prevention of crime. SVG did so by ratifying the Vienna Convention and by introducing legislation which gave effect to the requirements of the Convention. In that way, SVG was demonstrating concern for criminal activities that occurred within and without its borders. It was also instituting measures that would assist foreign law enforcement officials to detect, apprehend, prosecute and convict those engaged in criminal activities. Essentially, the legislative regime in SVG was a focal aspect of its crime prevention mechanism. It has nonetheless been identified in chapter 4 that there were certain aspects of SVG's legislation which required further strengthening. It was also mentioned that steps were being taken by the government, legislative and otherwise to plug any loopholes that did not favour the prevention of crime. SVG expressly indicated to the FATF that it had put measures in place to rectify through parliament certain legislative deficiencies relating to the lack of transparency of offshore operations. It was therefore evident from SVG's efforts and public pronouncements by Ministers of Government in the House of Parliament and elsewhere that SVG did not intend to create a safe haven for criminals and criminal activities.

The FATF demanded of SVG a legislative framework beyond the requirements of the Vienna Convention, a regime in which SVG participated as equal partners with other States of the United Nations. The FATF demanded that SVG's legislation should be amended to include suspicion as a state of mind sufficient for criminal liability, particularly for those charged with the responsibility of reporting suspicious transactions. SVG due to its compliance with the terms of the Vienna Convention was viewed internationally as being cooperative in the fight against crime, albeit of a drug related nature. It seems somewhat harsh that even after SVG had introduced money laundering legislation that included crimes other then drug related crimes it was still condemned by the FATF as being uncooperative. The DPMA 1988, DTOA 1993 and the PCA 1997 contained money laundering offences and imposed reporting responsibilities on financial institutions. Other legislation including the MACM 1993, FOA 1989 and the CRPA 1996 made provisions for the disclosure of information to assist law enforcement of other countries in a criminal investigation. There were also treaties that were executed with other countries for the purposes of assistance in criminal matters.[19] It would appear that the efforts of SVG were geared towards the prevention of crime. It had therefore demonstrated that it was prepared to do everything necessary to cooperate internationally without significantly damaging the commercial viability of the OFSS. Therefore, any deficiency that the FATF identified in SVG's regulatory and supervisory regime could have been rectified through effective dialogue along the same lines that were pursued by the FATF with Turkey and Austria. Sadly, there was no such dialogue with SVG concerning the form that its legislation should take and the likely adverse effect that its recommendations would have on the economy of SVG. The FATF merely dictated its initiative and demanded that SVG should follow it or suffer the consequences.

Little, if any concern was shown by the FATF for the impact that its global condemnation of SVG will have on SVGs economy and its peoples. SVG being fearful of the FATF's threats of countermeasures and continued vilification moved hastily to condemn its own financial system and introduced measures that adversely affected its OFSS in an attempt to satisfy the FATF. Accordingly, SVG repealed the PCA 1997 and the CRPA 1996 and included the PCMLA 2001 and the EIA 2002 in their places. Amendments were also made to the IBA 1996, IBC 1996 and the ITA 1996. Additionally a FIU was established pursuant to the FIUA 2001. The FIU is primarily responsible for receiving and evaluating suspicious transactions reports and liaising with other foreign FIUs and similar organisations on matters of a criminal nature. Closer examination of those legislative measures have shown that very little, if any, changes were made that were substantially different to the regime that existed prior to June 2000 when SVG was placed on the FATF's blacklist. Nonetheless, in June 2003, three years after it was blacklisted, SVG was removed from the FATF's blacklist. This in effect raises the question why, was SVG blacklisted in the first place and why did it take 3 years before SVG was removed from the blacklist? Those questions are relevant when consideration is given to the fact that none of the FATF's member States was blacklisted even though some have been unable to effectively control the criminal activities that occur within their borders and the fact that some

[19] See chapter 3

have not maintained or introduced regulatory and supervisory regimes that accorded with the FATF's 40 recommendations.

7.7 *Further implications of the OECD/FATF Initiatives*

The global condemnation of SVG by the OECD/FATF and their threats of sanctions significantly contributed to the drastic contraction in the registration of offshore entities. The OECD/FATF appeared to have exercised regulatory power arbitrarily and without any accountability. The exercise of regulatory power must be fair and legitimate but it was demonstrated that the OECD/FATF's initiatives were not implemented in that way. They had the option of regulating the transfers of monies which originate from within their jurisdictions to be sent abroad to non-member countries but they failed to exercise that option. In that way they would have been able to keep track of the money flows and the persons that are involved in such transfers. Such an approach, although it may have encountered some difficulties satisfying the requirements of Article 8(2) of the IMF Agreement[20] may nonetheless, have avoided the interference into the domestic affairs of other countries.

Essentially, the OECD/FATF by globally condemning SVG and imposing countermeasures and threats of countermeasures were prohibiting SVG from its pursuit of its 'political, economic and cultural development' of its peoples. This is a requirement of Article 1 of ICESCR 1966 which is endowed with a peremptory character from which the OECD/FATF member countries are not permitted under international law to derogate. Therefore, the manner in which the initiatives were implemented and the negative impact that they had on the OFSS bring into issue the infringement of the human rights of the people of SVG. It also demonstrates the inconsistency of the initiatives with respect to international legal principles.

The two pronged approach of the OECD and FATF had very serious implications for SVG's OFSS which lost over half of the offshore entities that were registered. This resulted in increased unemployment and a lost of opportunity to further develop an economic sector that appeared to have great potential and one which it is anticipated would have increased employment in the foreseeable future. In chapter 1 it was stated

[20] See chapter 6.9.2

that unemployment in SVG ranges between 22% and 40% and the poverty level is approximately 37%. If those that are unemployed cannot find legitimate sources of employment the temptation to engage in illegitimate sources of employment in order to sustain themselves and their families will be greatly augmented. With such high unemployment and poverty levels, the environment for involvement in criminal activities is cemented by the OECD/FATF's initiatives. This in itself will defeat the apparent purposes for which those initiatives were created and establish the conditions for the furtherance of crime.

On the basis of the aforesaid further questions are raised concerning whether the initiatives of the OECD/FATF were a conspiracy to prohibit SVG (and certain small island OFCs) from providing financial services on the pretext that its legislative regime was inadequate and that it devoted insufficient resources to the prevention of money laundering. It can be argued that the OECD/FATF were not actually seeking to regulate for the international cooperation and harmonisation of standards among States but instead they were seeking to regulate the competition involving the provision of financial services. Did the OECD/FATF member countries have a preference as to which countries should be allowed to provide offshore financial services?

The OECD/FATF countries were not supportive of the cartel arrangements that were made by the OPEC countries during the Arab Oil Crisis of the early 1970s. It was argued that the conduct of the members of OPEC was inconsistent with international legal principles. If the OECD/FATF's initiatives were designed to create a cartel for the provision of offshore financial services then the same argument that was used against the OPEC countries can also be extended to the actions of the OECD/FATF. Whatever the reason, the manner in which the OECD/FATF implemented their initiatives gave the impression that there was an insidious reason lurking in the background which was embellished and adorned in the cloak of crime prevention and harmful tax competition. The flaws in the evaluation processes, the apparent disregard for the adverse economic consequences, the forging ahead with the initiatives in total disregard for the sovereignty of SVG and that of other countries and their reluctance to blacklist their member countries cannot be seen as the proper application of plausible initiatives and therefore cannot be justified.